Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

NO. 73-1621

JOHN DIOGUARDI,

Petitioner,

-against-

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1973

NO.

JOHN DIOGUARDI, *Petitioner*,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, John Dioguardi, respectfully prays that a writ of certiorari issue to review the judgment and opinion entered in this proceeding on January 4, 1974, by the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Second Circuit's opinion in this proceeding was rendered on January 4, 1974, but is not yet reported. It is reproduced in the Appendix hereto, p. 3a, *infra*.

An opinion, dated July 18, 1973, by Chief Judge Edelstein of the United States District Court for the Southern District of New York, denying a motion pursuant to Rule 33 of the Federal Rules of Criminal Procedure is reported at 361 F. Supp. 954 , and reproduced in the Appendix hereto, p. 35a, *infra*.

JURISDICTION

The petitioner Dioguardi appealed to the Second Circuit from a conviction in the Southern District of New York on two counts of stock fraud [15 U.S.C. §78(j)(b)], one count of mail fraud (18 U.S.C. §1341), and one count of conspiracy. The appeal also brought up for review the denial of the petitioner's Rule 33 motion brought after verdict and prior to sentence, on the ground that one juror was mentally incompetent. The conviction was affirmed by the Second Circuit on January 4, 1974, one Judge dissenting from the denial of the Rule 33 motion. Timely application for rehearing was made and was denied on March 1, 1974, one Judge dissenting. The order denying rehearing is reproduced in the Appendix hereto, at p. 1a, *infra*.

On timely application, Mr. Justice Marshall, on March 22, 1974, extended the time for filing this petition to and including April 30, 1974.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a federal criminal defendant is denied his Sixth Amendment right to trial by jury, his Fifth Amendment right to due process of law, and his right under 28 U.S.C. § 1865(b)(4) to a jury of persons not "incapable by reason of mental infirmity, to render satisfactory jury service . . . " where:

> (a) Uncontradicted proof is submitted that 3 weeks after the verdict, a juror has written a bizarre letter to the defendant hinting of the things she saw while on the jury, and telling him of her cursed and half-opened eyes which see things before they happen, and of her ability to know what others are thinking and doing;
>
> (b) Seven psychiatrists state the letter shows she was actively psychotic with a schizophrenic thought disorder and suffered visual and auditory hallucinations during the course of the trial; and
>
> (c) The trial court refuses either to set aside the verdict, or to direct a hearing?

2. Whether a federal criminal defendant is denied his Fifth Amendment right to remain silent where:

> (a) He exercises his right not to take the stand or call witnesses in his own behalf;

(b) Over defense objections, the prosecutor is permitted to comment in summation that the defendant has failed to call witnesses to rebut the Government's case on the facts;

(c) The only witnesses capable of rebutting the prosecution case are the defendant himself or co-defendants whose testimony the defendant is unable to compel?

3. Whether two stock purchases, pursuant to a fraudulent scheme to corner the market in outstanding shares, constitute a single offense under 15 U.S.C. § 78(j)(b), the essence being fraud; or whether they are separate crimes, simply because the two purchases resulted in separate, though totally incident, uses of the mail?

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States:

Fifth Amendment: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

Fifth Amendment: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury . . .."

STATUTORY PROVISIONS INVOLVED

15 *United States Code*

§ 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange -

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

June 6, 1934, c. 404, § 10, 48 Stat. 891.

28 *United States Code*

§ 1865. Qualifications for Jury service

(a) The chief judge of the district court, or such other district court judge as the plan may provide, on his initiative or

upon recommendation of the clerk or jury commission, shall determine solely on the basis of information provided on the juror qualification form and other competent evidence whether a person is unqualified for, or exempt, or to be excused from jury service. The clerk shall enter such determination in the space provided on the juror qualification form and the alphabetical list of names drawn from the master jury wheel. If a person did not appear in response to a summons, such fact shall be noted on said list.

(b) In making such determination the chief judge of the district court, or such other district court judge as the plan may provide, shall deem any person qualified to serve on grand and petit juries in the district court unless he -

(4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service; or

* * *

As amended Mar. 27, 1968, Pub.L. 90-274, § 101, 82 Stat. 58; Apr. 6, 1972, Pub.L. 92-269, § 1, 86 Stat. 117.

STATEMENT OF THE CASE

The facts are set out in the majority and dissenting opinions of the Second Circuit, pp. 4a-17a, 27a, *infra*.

REASONS FOR GRANTING THE WRIT

1. The Juror Incompetence Issue

"Due process implies a tribunal both impartial and mentally competent to afford a hearing."[1] Section 1865(b)(4) of Title 28 U.S.C. provides that a person is disqualified from federal jury service by reason of mental infirmity. Paying lip-service to the constitutional principle and to the statutory juror qualification requirement, the Second Circuit proceeds to nullify

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1. *Orfield, "Trial Jurors in Federal Criminal Cases"*, 29 F.R.D. 43, 78 (1961). See also *United States v. Benson*, 31 Fed. 896, 900 (Calif., 1887) ("It is the Court's duty . . . to enforce any . . . objections to jurors which, from their nature, if well founded, would necessarily unfit them to act. Such would be the case if men insane . . . should be placed . . . on the panel . . .."); Cf. *Smith v. Cox*, 435 F.2d 453, 460 (4th Cir., 1971) *vac. other grounds sub nom. Slayton v. Smith*, 404 U.S. 53 (1971) ("Mental incompetence is at least as serious a defect as prejudice or interest on the part of a Judge, both of which have already been held constitutionally impermissible.")

them, first by invoking a legal anachronism - - characterized by Wigmore[2] as having "no sound basis in policy"; "no basis of precedent" and as persisting only "through the sponsorship of Lord Mansfield's great name - - then by applying the Lord Mansfield doctrine in a form discredited by modern authorities[3] and, finally, by setting the

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2. *XIII Wigmore, On Evidence*, § 2352 p. 696.

3. "The familiar rubric that a juror may not impeach his own verdict, dating from Lord Mansfield's time, is a gross oversimplification." Comment on the Proposed Rules of Evidence, Rule 6-06, 46 FRD 161, 290 (1969). While impeachment of a verdict by inquiry into the 'operation of the juror's minds' is not allowed, inquiry into the absence of any formality essential to the validity of the verdict is, and should be, permitted. *VIII Wigmore, supra*, § 2352, p. 695; *ABA Standards Relating to Trial by Jury*, Approved Draft, 1968 § 5.7 and commentary, pp. 164-75. In *Miller v. United States*, 403 F.2d 77, 83 n. 11 (2nd Cir., 1968), the court acknowledged that evidence may be taken to establish the existence of any extraneous influence in the jury room, noting that once the objective facts are established, no inquiry into the operation of the juror's mind is necessary as "the court must apply an objective test, assessing for itself the likelihood that the influence would affect a typical juror." Quite obviously the only inquiry necessary is to establish the fact of the juror's mental illness and to determine, under an objective test, the likelihood that such mental infirmity would make her incapable of rendering satisfactory jury service within the definition of 18 U.S.C. § 1865 (4).

threshold of proof, even for a factual hearing, at a level which no defendant is able to meet, or has ever been required to meet even in the cases relied upon in the majority opinion.[4]

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4. In virtually every reported case, hearings were held, often upon factual showings far less compelling than the one made in the instant case. See, for example, *Ex Parte Lovelady*, 207 S.W.2d 396 (1947), where the fact that a juror had been committed to an institution 8 years prior to trial was sufficient to convene a "lengthy" hearing at which lay and medical witnesses testified; *Eastman Kodak v. Summers*, 377 S.W.2d 476 (1964), where the adjudication was *39 years* before trial, however the court "on its own motion held a hearing and considered the propriety of granting a new trial because of this fact"; *State v. Bucy*, 66 P.2d 1049 (1938), where the juror had been committed 10 years before trial; *Anderson v. State*, 96 P.2d 281 (1939), where a hearing was held although the prior adjudication of incompetence was only under a state law permitting guardianship for spendthrifts or drunkards.

The single case cited as authority for the majority position that no factual hearing is necessary in this case - - *Peterman v. Indian Motorcycle Co.*, 216 F.2d 289 (1st Cir., 1954) - - is a civil negligence case where no issue of a criminal defendant's Sixth Amendment right was involved.

The Circuit holds that a bizarre letter reeking of psychosis plus the uncontroverted opinions of seven experts as to her obvious mental incapacity[5] is an insufficient basis not only for vacating the verdict, but even for requiring the District Judge to hold a factual hearing on the juror's mental competence.

The opinion holds that no showing of mental infirmity, except proof of a contemporaneous adjudication of mental imcompetence, ever warrants inquiry into whether a juror was mentally unqualified during trial (*infra*, p. 21a). This holding is not only unsupported by the cases relied on,[6] it totally disregards the modern realities of the treatment of the mentally ill, as well as the changes in jury selection practices brought about by the Jury Selection and Service Act of 1968 (Pub. L. 90-247, 82 Stat. 58, Pub. L. 92-269, 86 Stat. 117) which increased the

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5. Although the majority opinion characterizes the psychiatrists' opinions as "essentially horseback uninformed" (*infra*, at p. 17a), the dissent states (*infra*, p. 31a):

> " . . . in view of the district judge's oral order, not mentioned in the majority opinion , that no one was to contact the juror, these adjectives are simply not justified."

6. See "*Jurors - Tests of Qualifications*", 126 ALR 506 at 515 (1939). The cases merely hold that a prior or subsequent adjudication is some evidence warranting further inquiry. See also *II Wigmore*, *supra*, § 233.

possibility that non-institutionalized mentally ill persons will be placed on the jury rolls.

The mentally ill are no longer invariably confined in asylums or certified insane in judicial proceedings, but now often are treated on an out-patient basis in their own communities. See generally Brakel & Rock, *The Mentally Disabled and the Law* (Amer. Bar Foundation, 1971). Many severely psychotic persons who formerly would not have been called for jury duty because they were institutionalized are now subject to call simply because they reside at home, and because the fact of their mental illness can no longer be ascertained merely by determining whether they have ever been committed to an institution.

Moreover, before 1968, "most federal jurisdictions [used] the so-called key man system of jury selection by which 'key men' thought to have extensive contacts throughout the community, [supplied] the names of prospective jurors" 1968 U.S. Code Cong. & Admin. News, 1792, 1794 n. 1. While the elimination of this practice and the substitution of random selection based on voter lists achieved the salvatory purpose of eliminating discrimination, it also eliminated the traditional screening process for insuring that persons not committed to institutions but known in the community to be mentally unqualified would not be called for jury service. cf. 1968 U.S. Code Cong. News, *supra*, at 1795-96.

To require proof of institutionalization or an insanity adjudication as the *sine qua non* for inquiry into a juror's mental competence in an age when the mentally ill are no longer routinely

institutionalized or subjected to formal adjudication, and when jury selection procedures have increased the possibility that non-institutionalized mentally disturbed persons might be placed on the jury rolls, is to give the criminal defendant no protection at all against the very real danger that some juror who is actually disqualified by reason of mental incapacity will decide his guilt or innocence in violation of his Sixth Amendment rights and his rights under 28 U.S.C. § 1865.

This Court has stated that the jury is an essential instrumentality in the administration of criminal justice, as it is "the body ordained to pass upon guilt or innocence. Exercise of calm and informed judgment by its members is essential to proper enforcement of the law" *Turner v. Louisiana*, 379 U.S. 466, 472 (1965). While there have been many cases in this Court delineating the standards for fair jury composition or juror prejudice and bias, the only decisions on the issue of juror disqualification by reason of mental infirmity are over 60 years old, and have no precedential value in the administration of federal justice.[7] The other appellate

7. *Jordan v. Massachusetts*, 225 U.S. 167, 174-77 (1912) and *In Re Buchanan*, 158 U.S. 31 (1895). Both are state cases decided on the theory that the Sixth Amendment jury trial guarantee did not apply to state trials, and hence the manner in which a state court decided a juror incompetence question did not present a substantial federal constitutional question as long as the state had jurisdiction and gave a full hearing, thereby fulfilling its obligations under the Fourteenth Amendment.

[Footnote continued on following page]:

decisions relied upon by the Circuit are of nearly the same ancient vintage as *Jordan* and *Buchanan*, *supra*, or involve civil trials. The Circuit decision is the only recent appellate decision in the area and undoubtedly will become the leading authority on the issue of disqualification of a juror for mental incompetence not only because of its legal analysis and the prestige of the Second Circuit, but also because it is the only modern case on the subject. The decision should be reviewed by this Court because it is based upon assumptions about mental illness that are a generation out-of-date; the standard for relief it sets is legally archaic; and because it violates the petitioner's constitutional and statutory right to a tribunal mentally competent to afford a hearing.

If the decision is widely followed, all inquiry as to whether persons unqualified by reason of mental infirmity are being permitted to sit on juries will, as a practical matter, be foreclosed.

[Footnote continued from preceding page]

Moreover, since these were state cases, no issue was raised or decided either as to the proper construction of the predecessor statute to 28 U.S.C. § 1865, or as to this Court's power to enforce fair jury standards in the exercise of its supervisory power over the administration of federal criminal justice. Cf. *United States v. Greenberg*, 290 F. Supp. 382, 387 (S.D.N.Y., 1971); *United States v. Hand*, 472 F.2d 162 (5th Cir., 1972).

As we note above, preliminary screening of potential jurors is no longer part and parcel of the juror selection process under the Jury Reform Act of 1968. In addition, there are severe limitations upon a defendant's ability to gain information about a juror's mental competence at all stages of a federal criminal prosecution. Defense counsel does not receive the names of persons comprising the panel prior to trial, so that little or no pre-trial investigation can be made about the jurors. The *voir dire* is conducted by the trial judge, not by counsel, as in most state courts, and it is perfunctory by state standards where it is not unusual for defense counsel to interrogate a juror at great length on mental attitudes and personal beliefs. There is a strong policy forbidding post-verdict investigation or questioning of jurors (see *Miller v. United States*, *supra*, 403 F.2d 77),[8] and it is undertaken only at the peril of inviting censure. See, *United States v. Driscoll*, 276 F. Supp. 333 (S.D.N.Y., 1967). All of these strictures make it improbable that the defense will initiate harassing investigations of jurors and flood the courts with frivolous petitions, as the majority fears would follow if a hearing were ordered in this case. See, *infra*, at p. 18a. In point of fact,

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8. As the dissent points out, in this case, the trial judge specifically ordered counsel not to communicate with the juror "directly or indirectly" once the motion to set aside the verdict was filed; see, *infra*, at p. 31a.

the lack of preliminary screening and the existence of the restrictions preventing juror investigation at the whim of a losing party, make it essential that when information of an obviously bizarre and psychotic quality (*infra*, p. 22a) comes *unsolicited* to the defense, that courts do not altogether abrogate the directive of the statute, and the constitutional guarantee of a fair jury, by setting an unrealistic level of preliminary proof as the prerequisite for a hearing.

In *Remner v. United States*, 347 U.S. 227 (1954), *on remand*, 122 F. Supp. 673, *aff'd.* 222 F.2d 720, *judgment vacated* 350 U.S. 377 (1956), this Court held that where facts are alleged as to the disqualification of a juror, which if established would require vacating the verdict, then the trial court should not decide the question without an evidentiary hearing. In virtually every case involving post-verdict questions of juror disqualification on other bases such as bias, etc., the lower appellate courts have required hearings.[9] The Second Circuit opinion is in conflict with the decisions, and certiorari should be granted for that further reason.

Although this Court does not ordinarily grant review because a case was wrongly decided, the result reached in this case is so clearly a miscarriage of justice that it warrants review on this basis alone. The best proof of this is to

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9. See, for example, *Paz v. United States*, 462 F.2d 740 (5th Cir., 1972); *United States v. McKinney*, 429 F.2d 1019, 1025 (5th Cir., 1970), *Gafford v. Warden*, 434 F.2d 318 (10th Cir., 1970); *United States v. Hand, supra*, 472 F.2d at 162.

consider the one other problem created by the Circuit decision: What happens to Juror Rush now that she has revealed her clairvoyance? The chief judge of the district has the duty under 28 U.S.C. § 1865 to remove mentally unqualified persons from the roll of federal jurors. Unless Juror Rush is removed from the jury roll, she is going to be called again for jury service. Can she be permitted to sit in future cases just as though she never penned her letter in this one? If her name is removed from the jury roll, or it is somehow flagged to bring this episode to the attention of counsel in future cases so further inquiry can be made at a later time, has not a gross injustice been done to this petitioner in this case by refusing, at the least, to remand for a hearing on the juror's mental competence to sit in judgment upon him?

2. The prosecutor's comment on the petitioner's failure to take the stand or call witnesses in his own defense

At the trial below, petitioner's defense was that notwithstanding proof of a conspiracy to manipulate the market in Belmont shares, the Government failed to establish his participation in the conspiracy because the Government witnesses who testified against him were unworthy of belief.[10]

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10. Not only did the principal Government witness, Michael Hellerman, plead guilty before trial, he

[Footnote continued on following page]:

The three government witnesses who inculpated petitioner maintained he was present at certain specified meetings where the manipulation was discussed or where money changed hands. The Government witnesses testified that the only persons present at those meetings were themselves, the petitioner and co-defendants, whose testimony the petitioner could not compel.[11]

[Footnote continued from preceding page]

also admitted his guilt to about 20 other stock manipulations or other instances of criminal conduct such as a scheme to counterfeit bank checks, a scheme to pass $ 150,000 of stolen Treasury bills, attempts to bribe public officials, and the like. He had a written agreement with the Government that he would not be prosecuted for these crimes if he testified as a Government witness whenever called on to do so. The three other Government witnesses had also pleaded guilty to this or other stock swindles, and all hoped for consideration on sentence because they were testifying for the Government. Two of the witnesses also admitted perjurying themselves on prior occasions.

The three witnesses who inculpated petitioner were described by the Government, in summation, in this fashion (App. 801):

> "Hellerman, admitting to some 20 felonies in five years on the witness stand. Winter, a lawyer, pleading guilty to a felony and awaiting sentence. Schoengold, who can best be described as a lackey for Hellerman, a guy who lied, under oath, at the SEC so as not to point his finger at his associates."

11. See, p. 19, n. 14, *infra*.

In order to buttress the credibility of its witnesses, each of whom had undergone devastating cross-examination, the prosecutor made the argument which is reproduced in full *infra*, at p. 19, n. 14.

This Court has never determined whether such a comment by the prosecutor constitutes a violation of *Griffin v. California*, 380 U.S. 609 (1965). The First and Seventh Circuits follow the rule that it is error under *Griffin* for a prosecutor to argue that the evidence is uncontradicted when there is nothing in the record to show that anyone but the defendant[12] could contradict the evidence and hence where contradiction would require the defendant to take the stand. See, *United States v. Flannery*, 451 F.2d 880, 881-82 (1st Cir., 1971); *United States v. Handman*, 447 F.2d 853, 855 (7th Cir., 1971); *Rodriquez-Sandoval v. United States*, 409 F.2d 529 (1st Cir., 1969); cf. *Barnes v. United States*, 87 F.2d 832 (8th Cir., 1925).

The Second Circuit rule, followed in this case, rejects this formulation and holds that if it is theoretically, though not actually, possible that someone other than the defendant might somewhere be available to contradict any factual detail, then *Griffin* is not violated. See, *infra*, p. 4a.[13]

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12. Or co-defendants whose testimony the defendant cannot compel. *Desmond v. United States*, 345 F.2d 225, 227 (1st Cir., 1965); cf. *Bradley v. United States*, 420 F.2d 181, 186 (D.C. Cir., 1970).

13. In *United States ex rel Leak v. Follette*, cited by the Second Circuit at p. 23a *infra*, the Court held that the defendant might have called an alibi witness (even though no defense of alibi was tendered at trial) and hence there were other persons theoretically if not actually available to contradict the State's case.

Certiorari should be granted on this issue to resolve the conflict between the circuits, especially since in the majority of criminal cases, the defendant does not take the stand and is vulnerable to such comment; and also because in conspiracy cases especially, third parties usually are not present when the conspirators meet together to discuss the crime or to deliver and divide the proceeds.[14]

3. The Consecutive Sentences for Two Counts of Stock Fraud

The Belmont manipulations proceeded in two stages. First, Goodman and Soldano acquired control of the outstanding shares at $ 5.00 a share and drove the price up to $ 15.00 (*infra*, p. 8a). Hellerman was then to buy all the shares at $ 15.00 and take the price to $ 30.00 (*infra*, p. 8a). In order to accomplish this, Hellerman induced Ostrer to buy half of the outstanding shares at the $ 15.00 price (*infra*, p. 8a). Hellerman then placed orders for Ostrer's 14,000 shares at brokerage houses he controlled (*infra*, p. 9a, n. 6). One of these orders involved Hellerman's purchase of 2,000 shares on March 10 and resulted in Count 16 of the indictment (*infra*, p. 9a, n. 6). The other, for Hellerman's purchase of 3,500 shares at the same price on March 11, resulted in Count 17 (*infra*, p. 9a, n. 6). Both orders were for the purpose of cornering the market in the

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14. The prosecutor below stated to the jury that petitioner was one of the men "behind the scenes" (App. 31) and it would be fine if the Government had "nice witnesses" who happened to overhear the conversations but unfortunately the only potential witnesses against people in petitioner's position were crooks (App. 800).

outstanding stocks as a prelude to driving the price up to $ 30.00.[15]

Although Section 78(j) (b) of Title 15 is not a mail fraud statute, the indictment was drafted to make each separate use of the mails a separate count (App. 20-27).

In rejecting petitioner's argument that consecutive sentences on these 2 counts (totalling 4 years), were multiplicitous, the second circuit acknowledged that:

> " . . . there has been a debate in the past over whether such transactions constitute a multiple offense, the essential violation being illegal use of the mails, or a single offense, the essence being fraud." (*infra*, p. 26a)[16]

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15. The Government characterized its proof as follows:

> "Now, what are Goodman and Soldano to do with this stock once they have gotten the price to $ 15.00 per share? At that point by pre-arrangement a new cast of characters comes in . . . Hellerman and . . . Ostrer. Their function was to take the entire bushel of stocks off the hands of Goodman and Soldano and their various sources who controlled it all at a price of $ 15.00 per share, that is they were to buy the whole works, and the evidence will show that they, in fact, did buy the whole works." (App. 46-47)

16. Compare *United States v. Cashin*, 281 F.2d 669, 673 (2nd Cir., 1960); *United States v. Robertson*,

[Footnote continued on following page]:

Despite this the Circuit held that this issue had been resolved in favor of treating each transaction as a single offense (*infra*, p. 26a).

This Court has never decided whether violation of the securities fraud provisions in title 15[17] result in multiple offenses, the essence being use of the mails, or as a single offense, the essence being fraud. This question should be decided by the Court, especially since the two prime underpinnings of the Second Circuit decision are now of doubtful validity.

In reaching its result, the Circuit relied upon III Loss, *Securities Regulations* 1521-1522 (2nd Ed., 1961), which states that there is no reason to treat the securities fraud provisions differently from mail fraud violations, since under the mail fraud statute, even mailings not essential to the execution of the scheme will suffice. This rationale is no longer viable because of this Court's decision in *United States v. Maze*, 94 S. Ct. 645 (1974).

[Footnote continued from preceding page]

181 F. Supp. 158, 163-4 (S.D.N.Y., 1959); *United States v. McGuire*, 249 F. Supp. 43, 49 (S.D.N.Y., 1965); *United States v. Hughes*, 195 F. Supp. 795 (S.D.N.Y., 1961), with the *Sanders* case cited by the Circuit (*infra*, p. 26a).

In *United States v. Brown*, 36 F.R.D. 207, 208 (D.C., 1964), where the Court characterized the difference between the two lines of cases as "a debate over the proper method of drawing legal documents because it is inconceivable to the Court that if the defendants are convicted of all the [fraud] counts they would receive consecutive sentences."

17. This issue arises not only with Section 78(j)(b) but also with Section 77(q)(a) of Title 15.

Moreover, the position typified by *Blockberger v. United States*, 284 U.S. 299 (1932) that "the appropriate sentence and number of years for which a man shall be punished for an offense is . . . a function of the number of statutory violations into which his conduct may be parsed by a careful pleader" has been vigorously criticized and was disproved by the drafters of the new Federal Criminal Code, 8 Moore, *Federal Practice*, Suppl. § 8.07, p. 8-55, n. 17.1.

Certiorari should be granted on this issue to decide whether the *Maze* decision, by necessary implication, prohibits the proliferation of an act of securities fraud into multiple criminal charges simply because there were multiple, though incidental, uses of the mails; and whether the *Blockberger* rule should be reconsidered.

CONCLUSION

Each of the three issues upon which certiorari is sought presents a substantial question of constitutional right or statutory construction which ought to be decided by this Court. The decision below, on each question, has reached a result either in conflict with other authority, or, in the case of the jury competence issue, which will produce far-reaching and harmful consequences to the administration of criminal justice in the federal courts. For these and all the

foregoing reasons, certiorari should be granted in this case.

Respectfully submitted,

GRETCHEN WHITE OBERMAN
277 Broadway
New York, New York 10007

Counsel for Petitioner

Of Counsel

Jay Goldberg
299 Broadway
New York, New York 10007

ORDER DENYING REHEARING

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the first day of March, one thousand nine hundred and seventy-four.

United States of America,

Plaintiff-Appellee,

v.

Anthony Soldano, John Dioguardi, Garry Fredericks, Michael Hellerman, Michael Caricato, Fred Goodman, Richard Greenberg, Louis Ostrer, Morris Winter,

Defendants, 73-1759
73-1769

John Dioguardi, Louis Ostrer,

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant, John Dioguardi, a poll of the judges in regular active service having been taken and there being no majority in favor thereof,

ORDER DENYING REHEARING

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

Judge Mansfield dissents.

Irving R. Kaufman
Chief Judge

JAN 7 19[illegible]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 113-114—September Term, 1973.

(Argued September 13, 1973 Decided January 4, 1974.)

Docket Nos. 73-1759, 73-1769

UNITED STATES OF AMERICA,

Appellee,

—v—

JOHN DIOGUARDI and LOUIS OSTRER,

Defendants-Appellants.

Before:

LUMBARD, FRIENDLY and FEINBERG,

Circuit Judges.

Appeal from convictions, after a jury verdict, in the District Court for the Southern District, David N. Edelstein, *Chief Judge,* for violations of the federal securities laws (15 U.S.C. §§ 77q(a), 77x, 78j(b) and 78ff), Rule 10b-5 of the Securities and Exchange Commission (17 CFR 240. 10b-5), and federal mail fraud statute (18 U.S.C. §§ 1341), and for conspiracy (18 U.S.C. §371); and from a denial of new trial motions for alleged incompetency on the part of a juror contrary to 28 U.S.C. § 1865(b)(4).

Affirmed.

HAROLD F. MCGUIRE, JR., Assistant United States Attorney for the Southern District of New

York (Paul J. Curran, United States Attorney for the Southern District of New York, S. Andrew Schaffer and John W. Nields, Jr., Assistant United States Attorneys for the Southern District of New York, on the brief), *for Appellee.*

GRETCHEN WHITE OBERMAN, New York, New York (Jay Goldberg, on the brief), *for Appellant Dioguardi.*

SHELDON H. ELSEN, New York, New York (Orans, Elsen & Polstein, Lewis Shapiro, Anthony J. Ferrara and Henry J. Boitel, on the brief), *for Appellant Ostrer.*

LUMBARD, *Circuit Judge:*

John Dioguardi and Louis Ostrer appeal from judgments of conviction entered on April 12, 1973, after a three-week jury trial held in January 1973 in the Southern District, and from the denial by Chief Judge Edelstein of new trial motions. The forty-count indictment was filed May 27, 1971, against the appellants and seven others.[1] Count one charged the defendants with conspiring, in violation of 18 U.S.C. § 371 to violate provisions of the federal securities laws and regulations, 15 U.S.C. §§ 77q(a), 77x,

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1 Of the seven other defendants named in the indictment, three entered guilty pleas (Michael Hellerman, Fred Goodman, and Michael Caricato). Three were tried jointly in a separate trial and were convicted of one or two offenses (Gary Fredericks, Richard Greenberg, and Anthony Soldano), see *United States* v. *Greenberg*, doc no. 72-2368 (2d Cir.), aff'd from the bench, Feb. 16, 1973. The case of the seventh defendant (Morris Winter) was not tried in view of his cooperation with the government and his guilty plea in a related case. Winter, Hellerman, and Goodman testified for the government, as did Steven Schoengold and Bruce Halpern, both named as co-conspirators.

78j(b), and 78ff, and Rule 10b-5, 17 CFR 240.10b-5,[2] and the federal mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343. The remaining counts charged substantive violations of these same provisions, except 18 U.S.C. § 1343.

On January 26, 1973, the jury found Ostrer guilty on eleven of the seventeen counts submitted to them by the court, and Dioguardi on four of the nineteen counts submitted as to him.[3] Prior to sentencing, the defendants moved for a new trial or, in the alternative, for an evidentiary hearing. The basis for this motion was an unsolicited letter from one of the jurors to Dioguardi which allegedly established the incompetency of that juror. In reliance on this, and on the provisions of 28 U.S.C. § 1865 (b)(4), they claim that they had been deprived of their right to have their case heard and decided by a panel of twelve competent jurors. Judge Edelstein denied the motion on April 12th. He sentenced Dioguardi to nine

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2 15 U.S.C. § 77q(a) codifies section 17(a) of the Securities Act of 1933, prohibiting fraud in the sale of securities. Wilful violation of this section is made criminally punishable by section 24 of the Securities Act of 1933, now 15 U.S.C. § 77x. Rule 10b-5 of the Securities and Exchange Commission (17 C.F.R. § 240.10b-5), which prohibits fraud or the use of manipulative devices in both the purchase and sale of securities, was promulgated under 15 U.S.C. § 78j(b), originally section 10(b) of the Securities Exchange Act of 1934. Wilful violation of this rule is made criminally punishable by section 32(a) of the Securities Exchange Act of 1934, now 15 U.S.C. § 78ff.

3 Both defendants were found guilty on the conspiracy count (18 U.S.C. § 371). Ostrer was found guilty on the following substantive counts:

9—Causing a sale confirmation to be placed in the mail in furtherance of a fraudulent scheme for the sale of stock (15 U.S.C. §§ 77q(a), 77x);

16 through 19—Causing purchase confirmations to be placed in the mail as part of a manipulative device in contravention of Rule 10b-5 (17 C.F.R. § 240.10b-5; 15 U.S.C. §§ 78j(b), 78ff);

31, 33 through 36—Use of the mails as part of a scheme to defraud (18 U.S.C. § 1341).

Dioguardi was found guilty on only three of the substantive counts: 16, 17, and 31.

years' imprisonment and a $30,000 fine, and Ostrer to three years' imprisonment and a $55,000 fine.[4]

In addition to their objections relating to alleged juror incompetency, the defendants raise four other claims of error in the conduct of the trial: first, that the government prosecutor's argument in summation, to the effect that neither defendant called witnesses to contradict the government's testimony, was improper comment on each appellant's failure to testify in view of the assertion by each that he alone was in a position to contradict the government's witnesses; secondly, that it was error for the trial court to have refused to charge, as requested, that the testimony of admitted perjurers and felons was to be scrutinized with care and caution; thirdly, that it was improper for the trial court to have ruled that Dioguardi's acquittal of another crime could not be proved when the government intended to utilize the acts underlying the acquittal to show a prior course of illegal conduct; finally that consecutive sentences for Dioguardi on two of the counts charging securities law violations, counts 16 and 17, were improper since the underlying facts constituted only a single offense.

We find the defendants' arguments unpersuasive and we accordingly affirm the convictions below and let Dioguardi's sentences stand.

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4 The sentences imposed by Judge Edelstein were as follows: in the case of Dioguardi, a prison term of 5 years and a $10,000 fine on count 1, 2 years and $10,000 on count 16 and similarly on count 17, and 5 years and $1000 on count 31; and in the case of Ostrer, 3 years and a $10,000 fine on count 1, 3 years and a $5000 fine on count 9, 2 years and a $10,000 fine on each of counts 16 through 19, 3 years on each of counts 21 and 33 through 35, and 5 years on count 36. Dioguardi's prison terms are consecutive, Ostrer's concurrent. The sentence imposed on Dioguardi on count 31 was suspended, with five years' probation. The sentence imposed on Ostrer on count 36 was also suspended, with one day's probation.

I.

The evidence at trial revealed a scheme to manipulate the price of the stock of Belmont Franchising Corporation ("Belmont"), a substantially worthless over-the-counter security. The book value of the stock was almost negligible (Belmont's assets were essentially paper holdings in other concerns); it had been traded for only a short time and for at most a few dollars a share.[5]

In January of 1970 Michael Hellerman, who pleaded guilty and testified for the government, began steps to drive up the price of Belmont stock, first to $5 or $6 a share and then to nearly $50 a share. At that time two stock manipulators, Anthony Soldano and Fred Goodman,

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5 Belmont's initial offering of stock to the public was made in the spring of 1969. In an offering circular dated March 21, 1969, and under the statutory exemption from registration for small issues, Belmont offered 100,000 shares out of an authorized 1,000,000, par value 1¢, at an offering price of $3 a share. The circular stated that the offering was speculative and that the price of the shares bore no relation to the book value of the company. In fact, at the time, Belmont's total assets amounted to roughly $10,000 and its liabilities to roughly $7000.

By October 20, 1969, according to the 2A form filed by Belmont with the Securities and Exchange Commission on that date, only 870 shares of the offering had been sold, with 99,130 unsold shares remaining.

On January 2, 1970, in exchange for a total of 195,000 restricted shares of Belmont stock, Belmont acquired 100% holdings in three other concerns: Top Secret International Programming, Slimorama International Corp., and Wonderful World of Grooming. Prior sales of these newly-acquired companies amounted to merely a few thousands of dollars, and net profits for each were about $1000. Nonetheless they listed total assets slightly in excess of $1,000,000. Top Secret International Programming listed a "computer program" valued at $500,000, and the other two enterprises each listed "formula rights" valued at $250,000. These assets were reflected in supplementary notes in Belmont's financial statements for the end of 1969, but the underlying statements of the three subsidiaries, conveniently acquired after the start of the year, were unaudited.

Belmont's second 2A statement, filed with the SEC in April, 1970, indicated that 28,720 shares of the March 21, 1969, offering had been sold, and that no more of the original 100,000 shares were still being offered.

in concert with Hellerman, commenced acquiring substantially all of the 28,720 known publicly tradeable shares of Belmont. Goodman and Soldano executed their purchases ostensibly through the open market, using brokers who quoted prices for Belmont through the National Quotation Bureau's pink sheets for over-the-counter securities. These purchases created the appearance of an active public market in the stock.

By early March, 1970 Goodman and Soldano had caused the market price of Belmont as quoted in the pink sheets to reach $15 a share. They did this primarily through directions to their brokers, who traded small quantities of the stock among themselves. In the meantime, Goodman and Soldano had acquired control, they believed, of all the outstanding stock.

At this point Hellerman's role became paramount. According to his testimony, he already had an understanding with Dioguardi that "whatever I did in the future, . . . he would have 25 per cent." It had also been agreed between Hellerman, on one side, and Goodman and Soldano on the other that once the price of Belmont stock reached $15, Hellerman and his associates would purchase all the stock at the $15 level, with a $5 per share kickback, prior to further manipulation upwards. In confirming this arrangement with Goodman and Soldano, Hellerman took Soldano to Dioguardi's office "to make sure it was on the record."

According to Hellerman, it was at this time in early March that he brought Ostrer into the scheme, although the two were only recently acquainted. Ostrer agreed to commit himself to buy 14,000 shares of Belmont at $15 a share ($210,000 total), with the understanding that he would split any future profits with Hellerman, that Hellerman would guarantee him against loss, and that a loan of the purchase money would be arranged so that he would

not have to "lay out a quarter" of the $210,000. Purchase orders in Ostrer's name or in his behalf were to be made through various New York Stock Exchange firms.

Ostrer then placed orders in his own name and in his sister's for 14,000 shares of Belmont. However, most Exchange firms which he approached refused to accept his orders, and he was forced to place relatively large block orders through firms where brokers were already in league with Hellerman.[6]

Contemporaneously, Hellerman made arrangements with others to purchase the remaining 14,000 or so shares of Belmont. These individuals were able to pay the selling brokers (at the $15 a share price), but Ostrer was unable to raise the $210,000 needed to "hold up" his end of the deal, a circumstance which left his brokers unpaid. According to Hellerman, he thereupon obtained a loan for Ostrer through Dioguardi. The funds, totalling $60,000, came from Hickey DiLorenzo, at an interest rate of 1½% a week. DiLorenzo also demanded and received $24,000 from Hellerman for this favor (part of the kickback profits already made). In addition, Hellerman also advanced Ostrer $52,500, and Ostrer obtained the balance he needed from other sources.

Thereafter, from the end of March through late April, 1970, Hellerman directed purchases and sales of Belmont stock at ever-increasing prices among the individuals and brokers whom he controlled. He kept Dioguardi, Ostrer, and DiLorenzo informed as the price rose. He also ar-

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6 Among these orders were ones through Bruce & Co. on March 10, 1970, for 2000 shares, and through Kelsey & Co. on March 11, 1970, for 3500 shares. Co-conspirator Bruce Halpern (see fn. 1 *supra*) was a principal of Bruce & Co. Co-conspirator Schoengold was a vice president of Kelsey & Co., and Hellerman was an undisclosed owner of Kelsey.

These particular purchases on March 10th and 11th are relevant to defendant Dioguardi's challenge (discussed further below) to alleged pyramiding of offenses.

ranged for Ostrer to sell off enough stock, through a nominee, to repay the $60,000 loan from DiLorenzo—with a $1700 profit left over which he split with Ostrer. By the end of April he had received approximately $140,000 in kickbacks from Goodman and Soldano. He gave $30,000 to Dioguardi, and invested $9,000 more in a business in which Dioguardi had an interest.

In early May, 1970, the scheme failed. The president of Belmont, through a broker unknown to the manipulators, began to sell heavily his own "investment" stock in the corporation. The market was unable to absorb the sales, and Hellerman was unwilling to buy the stock and could not find other purchasers. Consequently the market for Belmont collapsed, leaving Ostrer (among others) with large quantities of unsold stock. Ostrer then tried to hold Hellerman responsible for his losses. Hellerman became worried because DiLorenzo took Ostrer's side. Dioguardi subsequently arbitrated the dispute to some extent, and arranged for partial compensation to Ostrer to the sum of $25,000.

At trial Dioguardi called no witnesses and based his defense primarily on cross-examination going to the lack of credibility of the government's major witnesses, who were all accomplices. Ostrer did not testify but he did call two witnesses whose testimony indicated that Ostrer had been a "victim" of Hellerman's machinations.

About ten days after trial, Dioguardi received a letter from one of the jurors, Miss Genena Rush, a nurse's aide employed at Flower Fifth Avenue Hospital in New York City. The letter was written on stationery bearing the zodiac sign of Libra, and on one page the legend that it was "the heavenly house under which I was born." The juror wrote of her clairvoyant powers which enabled her to see that Dioguardi was basically a good person. She stated her belief that he was guilty, "Your mistake your

guilty," and questioned him about Hellerman, "Why you let such a relationship exist between you and a man like Hellerman?," and called upon him to repent, "One word appear before me *repent*. If you repent and run a clean business it is the good within you that will save you, and you will gain what you have lost." Miss Rush stated that

> I have eyes and ears that I can see things before it happen. I can tell you about other and what they are thinking and doing.

and that her eyes

> are only partly open . . . . Unfortunate, a curse was put upon them some years ago. I have some people working on them.

The letter is reproduced in full in the margin.[7]

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7 Miss Rush's letter reads as follows:

521 W 152 Street, New York, N.Y. 10031
February 8th—1973

Dear Mr. Dioguardi,

Under the situation and such circumstance I hope that I have made the right decision. I talk to my friends Bertha and her husband Olive about this, Olive agree that I write to you. Bertha, however, was against it. Nevertheless, I felt I had to write you. I cannot omit what I have seen. When I saw the good within you and how hard your wife was trying; I prayed about it. One word appear before me *repent*. If you repent and run a clean business it is the good within you that will save you, and you will gain what you have lost. Before I continue I must explain something to you. I have eyes and ears that I can see things before it happen. I can tell you about other and what they are thinking and doing. If I am wrong about this it is the first time.

I would like to visit you. I would like to talk to you about what appear before me. I would like to do so when my eyes fully open. They are only partly open. I don't know at the present when they will open. Unfortunate, a curse was put upon them some years ago. I have some people working on them. Everything is being done that can be done. So we will have to wait. As I stated I cannot omit what appear before me, when I was on the jury bench. You

Dioguardi's attorneys sent copies of the letter to seven psychiatrists, all of whom responded (one in an affidavit) to the effect that, in their opinion, what Miss Rush had written indicated hallucinatory tendencies, symptoms of possible psychosis, paranoia, and grandiosity, and in gen-

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feel that this is the end for you. However, it is not. Something appear before me that I must do. It is the good within you that I must use and within that good, you will gain what you have lost. If, however, I am wrong it is the first time.

Why, you let such a relationship exist between you and a man like Hellerman? When I think of the good that I saw within you it does not add up. Where did Hellerman get those fur coats? Does he have any for sail? Omit the question. I really can't afford one, and if I could I probably be afraid to wear it.

Why persecute your wife? Your mistake your guilty then take it out on her. The ordeal you put her through I wonder how she survive through it. One word appear before me brave. She is a brave girl. She love you. She never stop loving you not a single moment. Tell her to please be careful. From what I can see she is still in business. I suggest it is not wise at this time. I believe she is being watch.

That was a good lawyer you had. I entain to send him some custom as soon as my eyes open.

Tell Ostrer I am praying for him.

Mr. Dioguardi, I want to ask a favor of you please.

I want you to look upon me as a woman and I look upon you as a man and not white man and black woman. Olive agree with me.

Let's leave color out, *OK*.

I was told you will only have to serve one third of the time given. So relax this is not the end. Soon you will be free.

When I call the Federal information center and the record room yesterday they all know you. They all seem to have it in for you. Its seated deep within them like a personal matter.

Sincerely,

Genena

The letter sheets were printed with the word "LIBRA" and a picture of a woman with scales. On the last page of the letter, under the picture, Miss Rush wrote, "The sign Libra is the heavenly house of the zodiac under which I was born." The letter was addressed to "Mr. John Dioguardi, Federal Correction Institution, Dan Bury, Conn. 06813."

eral an inability to appreciate reality without fantasizing.[8] The psychiatrists also pointed out that further psychiatric analysis was needed before a diagnosis could be ventured with any certainty, or before it could be said that Miss Rush's infirmities, whatever their nature and extent, might have rendered her unable to comprehend the proceedings at trial.[9] The psychiatrists were given no information about

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8 The copy of the letter which Dioguardi's attorneys used at first was not the original from Juror Rush. Rather it was a handwritten copy which Dioguardi had made of the original and which he had forwarded to them. Somewhere in transcribing the word "omit" was changed to "admit" in the fifth sentence of the first paragraph and also in the ninth sentence of the second paragraph. Thus "I cannot omit what I have seen . . ." became "I cannot admit what I have seen . . ." and, similarly, "I cannot omit what appear before me . . ." became "I cannot admit what appear before me. . . ." Six of the seven psychiatrists (all except Dr. Portnow) received their copy of the letter in this incorrect form. These errors may have influenced their reading and subsequent analysis of the letter, but we do not think significantly. The defendants' contentions concerning the competency of Miss Rush rest as much on the letter taken as a whole as on any particular sentences. While not belittling its importance, we do not think that reliance on the incorrect word "admit" was, as the government contended, "the cornerstone of [the] various psychiatric opinions."

9 The supporting letters of the psychiatrists and the affidavit of Dr. Portnow need not be set out at length. Samples of their conclusions are as follows:

1.) Dr. Stanley L. Portnow (affidavit of April 2, 1973):

[T]he letter makes a positive presumptive showing that . . . the juror suffered from a chronic psychotic thought disorder which so severed her relationship with reality that she was unable to exercise critical judgment or to function in an unbiased manner in the evaluation of evidence produced at the trial. Indeed, it would appear that her unsoundness of mind was so overwhelming that she was subject to auditory and visual hallucinations, delusions and a belief in her own omnipotence.

The exact nature of the type of psychosis which the juror is afflicted, can be further investigated. . . . Such an investigation would entail clinical psychiatric interviews and, of particular importance, psychological testing. . . .

2.) Dr. Samuel C. Karlan (letter of March 15, 1973):

It is clear from this letter that this patient is having imaginations about what she can see and what she can do and these are

the juror or about the trial and the issues, and the court had forbidden anyone to seek to interview her.

On the basis of Miss Rush's letter and the opinions of the psychiatrists, Dioguardi and Ostrer moved pursuant to Rule 33, F.R.Crim.P., for a new trial or, in the alterna-

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in the form of visual hallucinations and apparently auditory hallucinations. It is also clear from this letter that she had these visions while she was on the jury.

It is therefore my opinion that the letter is evidence that this patient underwent a psychotic episode while she was on the jury and while she wrote this letter, which is suggestive of a schizophrenic mechanism and that she was not in contact with reality.

3.) Dr. Robert W. Damino (letter of March 15, 1973):

The contents of the letter written by Gemena *(sic)* Rush indicate that she is substantially disturbed in reality relationships . . . that she was having visual hallucinations . . . [and] that this woman was making an identification with the accused. . . .

[A]t the time she served on the jury she was utterly incapable of thinking logically as to the evidence, and utterly incapable of properly evaluating the evidence.

4.) Dr. Jerry C. Atkins (letter of March 16, 1973):

My impression is judging from this letter Miss Rush would have had great difficulty exercising sound judgment during the trial mentioned in her letter. Her religious convictions could be classified as being ideas of grandiosity and furthermore there is evidence of auditory and visual halucinations *(sic)* in her description of herself.

5.) Dr. John J. Vetter (letter of March 15, 1973):

[T]here is clear cut evidence of mental disorder. . . . The abnormal thinking processes, impairment of judgment, hallucinatory experience and delusional belief directly involving the case at hand, would indicate an incapacity, by reason of mental infirmity, to render efficient jury service, or to have functioned efficiently as a juror in the case concerned.

6.) Dr. Arnold H. Zucker (letter of March 5, 1973):

The writer is emotionally involved with Mr. Dioguardi, in an intensive manner.

The writer is concerned with Mr. Dioguardi's welfare and fate.

The writer wishes to be helpful and supportive.

The writer believes she possesses powers of clairvoyance and feels impelled to act upon her revelations.

The writer experiences guilt about Mr. Dioguardi's incarceration.

tive, for an evidentiary hearing on the competency of Miss Rush as a juror. They asserted that an uncontroverted showing of incompetency had been made out, in violation of 28 U.S.C. § 1865(b)(4) and their constitutional rights.[10]

She is convinced about his "bad" behavior (wrongdoing, association with "a man like Hellerman") but "sees" the "good" in him. Her responses are somewhat appropriate in the context of her educational, cultural, and religious background. To alleviate her guilt feelings and "save" Mr. Dioguardi, she urges him to "repent", mend his ways, and maintain his faith. . . .

I believe that the data suggests the following psychodiagnostic impressions, which require clinical confirmation (psychiatric evaluation of the writer).

1. Above the cultural-religious beliefs, *autistic* (pathological fantasy preoccupation) *trends* are indicated. . . .

2. *Paranoid trends* are significant. . . .

. . . .

[M]y psychiatric impression is that of a highly paranoid, autistically preoccupied (probably psychotic) individual, who has maintained fairly adequate external controls and functioning, but who may be decompensating due to the strong emotions produced by her role in the trial.

7.) Dr. Donald M. Brough (letter of February 28, 1973):

[T]his letter was written consciously with every good intention on the part of Mrs. *(sic)* Rush in an effort to be helpful to Mr. Dioguardi. However, . . . the writer was here showing evidence of being hallucinated, delusional and would prove to be suffering from a Paranoid Condition.

Taking it in a far less literal fashion, allowing the greatest degree of latitude interpreting what she wrote, so that it can be taken as a somewhat picturesque, idiosyncratic expression of her ideas, influenced by educational, cultural and religious factors, I still would find important grounds for believing that the letter shows that she was involved in this situation in a very unreal and unusual way.

In my opinion it is most likely that she is, in fact, suffering from a Paranoid Condition in which she has hallucinatory experiences and delusional thinking.

Whatever the court may consider the proper steps to take in regard to any other aspect of the case, it would be my hope that further psychiatric examination would be gently encouraged upon her, and that she would be willing to cooperate.

10 28 U.S.C. § 1865, which is part of the Jury Selection and Service Act of 1968, P.L. 90-274, 82 Stat. 53, provides in relevant part as follows:

Judge Edelstein, after hearing oral arguments and receiving briefs, denied the motion for a new trial and for further investigation of the juror's competency on April 12, 1973, and later filed a thorough and considered opinion on July 18, 1973. He stated:

> Moreover, there was nothing in the demeanor of the juror during *voir dire*, trial or deliberations to indicate that she was anything but competent to serve on the jury. On *voir dire*, the jurors were asked group questions in an effort to elicit from them their feelings of bias or prejudice which would prevent them from rendering a fair and impartial verdict. [footnote omitted] In direct colloquy with me, the juror answered directly and responsively, stating that she understood my questions and comments, and specifying the particular ones which applied to her. Nothing in her responses and demeanor indicated that her reasoning abilities or mental processes were deficient. Indeed, her ability to recall my questions applicable to her, conveyed the opposite impression. Likewise, during the three weeks of trial and three days and nights of deliberations, I did not notice anything unusual about her. Nor was anything unusual concerning her brought to my attention by either the attorneys or jurors.

(b) In making such determination [whether a juror is qualified to serve] the chief judge of the district court, or such other district court judge as the plan may provide, shall deem any person qualified to serve on grand and petit juries unless he . . .

(4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service. . . .

The Act provides no guidelines, however, for what procedures are to be followed where there is, after trial, discovery of possible grounds for juror disqualification. However, see fn. 12, below. See also ABA Standards Relating to Trial by Jury, Parts II, V, and Commentary (Approved Draft 1968).

Examination of the juror on the voir dire had disclosed that she was then employed by Flower Fifth Avenue Hospital as a patient attendant assisting the nurses and had been so employed for four years. In answer to the court's question as to whether any questions or comments applied to her, she stated that in 1944 she was employed by the Navy Department in Cleveland as assistant to the foreman in the cleaning department. Prior to her current hospital employment she was a silk finisher in a cleaning shop in the Bronx.

II.

A—Competency of Juror Rush

It is well settled that only clear evidence of a juror's incompetence to understand the issues and to deliberate at the time of his service requires setting aside a verdict. And only strong evidence that it is likely that the juror suffered from such incompetence during jury service will justify an inquiry into whether such incompetence in fact did exist. In our view the juror's letter, and the essentially horseback uninformed opinions of the psychiatrists regarding the letter, fall considerably short of justifying any further inquiry. Furthermore, the appellants have not cited a single authority which supports a grant of their motion on this record. Judge Edelstein was entirely correct in denying the motion.

Reluctance to inquire into the state of mind of any juror and into the conduct of the jurors during their deliberations rests on sound reasons.[11] The rule against

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11 See 8 Wigmore, Evidence §§ 2349, 2352-2354 (McNaughton rev., 1961). As the Supreme Court said in *Stein* v. *New York*, 346 U.S. 156, 178 (1953):

> Nor have the courts favored any public or private post-trial inquisition of jurors as to how they reasoned, lest it operate to intimidate, beset and harass them. This Court will not accept their own

any inquiry whatever recognizes exceptions only where there is clear and incontrovertible evidence of incompetence shortly before or after jury service, clear evidence of some criminal act, or evidence of some "objective fact" of internal impropriety.[12] Even in the case of recent incompetence a hearing will be had to establish that it must have existed during jury service.

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disclosure of forbidden quotient verdicts in damage cases. *McDonald* v. *Pless*, 238 U.S. 264. Nor of compromise in a criminal case whereby some jurors exchanged their convictions on one issue in return for concession by other jurors on another issue. *Hyde* v. *United States*, 225 U.S. 347. "If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference." *McDonald* v. *Pless*, [238 U.S. 264 (1915)] at 267-268.

12 See 18 U.S.C. §§ 245(b), 1503, 1504. See also 28 U.S.C. § 1867(*f*). Such exceptions as these which the law has condoned to the privacy and sanctity of the jury reflect the need to preserve its impartiality. The quickness with which jury findings will be set aside when there is proof of tampering or *external* influence, and the severe penalties imposed on those who attempt such interference, parallel the reluctance of courts to inquire into jury deliberations when a verdict is valid on its face. See *Mattox* v. *United States*, 146 U.S. 140, 149-50 (1892). Such exceptions support rather than undermine the rationale of the rule that possible *internal* abnormalities in a jury will not be inquired into except "in the gravest and most important cases." *McDonald* v. *Pless*, 238 U.S. 264, 269 (1915).

These considerations explain the one exception to the rule against a jury impeaching its own verdict allowed in those instances when the evidence offered of internal impropriety concerns "objective facts." This "distinction between what may and what may not be established by the testimony of jurors to set aside a verdict" has been recognized by the Supreme Court. See *Mattox* v. *United States*, *supra*, at 148-149. However, courts have invoked the exception and permitted inquiry into a jury's deliberation only when there has been a strong showing of "objective" impropriety, such as blood relation between juror and defendant or extraneous material brought to the jury's attention during deliberations. As the Supreme Court said in *United States* v. *Reid*, 53 U.S. 360, 366 (1851), "[C]ases might arise in which it would be impossible to refuse [evidence of impropriety] without violating the plainest principles of justice." But "[u]nquestionably such evidence ought always to be received with great caution." Nor has the Court seen fit since then to relax its position, *McDonald* v. *Pless*, *supra*, at

The strong policy against any post-verdict inquiry into a juror's state of mind was stated by this court regarding an analogous situation in *United States* v. *Crosby*, 294 F.2d 928, 950 (1961), cert. denied sub nom. *Mittelman* v. *United States*, 368 U.S. 984 (1962):

> There are many cogent reasons militating against post-verdict inquiry into jurors' motives for decision. The jurors themselves ought not be subjected to harassment; the courts ought not be burdened with large numbers of applications mostly without real merit; the chances and temptations for tampering ought not be increased; verdicts ought not be made so uncertain.

We cited this language in *Miller* v. *United States*, 403 F.2d 77 (1968) where the court also emphasized, at page 82, the importance of the dangers presented by inquiries that go beyond objective facts: "inhibition of jury room deliberations, harassment of jurors, and increased incidence of jury tampering." See also *Stein* v. *New York*, 346 U.S 156, 178 (1953); *McDonald* v. *Pless*, 238 U.S. 264, 268 (1915); and *Mattox* v. *United States*, 146 U.S. 140, 147-151 (1892).

With respect to post-verdict evidence of possible juror incompetency during the trial, courts have refused to set aside a verdict, or even to make further inquiry, unless there be proof of an adjudication of insanity or mental incompentence closely in advance of the time of jury ser-

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269. See *Rotondo* v. *Isthmian Steamship Co.*, 243 F.2d 581, 583 (2d Cir. 1957); *United States* v. *Crosby*, 294 F.2d 928, 949-950 (2d Cir. 1961), *cert. den. sub nom. Mittelman* v. *United States*, 368 U.S. 984 (1962); 8 Wigmore, Evidence § 2349 (McNaughton rev., 1961). See also ABA Standards Relating to Trial by Jury, Sec. 5.7; *United States ex rel. Owen* v. *McMann*, 435 F.2d 812 (2d Cir. 1970), *cert. denied*, 402 U.S. 906 (1971); and Judge Friendly's discussion in *Miller* v. *United States*, 403 F.2d 77 (2d Cir. 1968), fn. 11, at 83-84.

vice.[13] Only when proof of this nature has been offered, or proof of a closely contemporaneous and independent post-trial adjudication of incompetency,[14] have courts conducted hearings to determine whether the disability in fact affected the juror at the time of trial.

But absent such substantial if not wholly conclusive evidence of incompetency, courts have been unwilling to subject a juror to a hearing on his mental condition merely on the allegations and opinions of a losing party. In *Peterman* v. *Indian Motorcycle Co.*, 216 F.2d 289 (1st Cir. 1954), the plaintiff, shortly after judgment against him in a civil suit for personal injury, moved for a new trial on the grounds "that certain information, discovered since the trial, disclosed the mental unfitness of the foreman of the jury, whose condition, if it had been known . . ., would have been a ground for disqualification." Judge Wyzanski heard counsel on the motion and requested an offer of proof from the plaintiff's attorney.

> The offer of proof was . . . that the juror in question, because of his mental disturbance, has been receiving disability compensation from the Veterans Bureau; that he has difficulty in sleeping and concentrating; that his memory is not good; that he has had depressed

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13 See *Anderson* v. *State*, 54 Ariz. 387, 96 P.2d 281 (1939); *Grand Lodge A.O.U.W. of Ark.* v. *Wood*, 113 Ark. 502, 168 S.W. 1070 (1914); *Austin* v. *People*, 106 Colo. 506, 107 P.2d 798 (1940); *Brown* v. *State*, 219 Ark. 647, 243 S.W. 2d 938 (1951); *Ex parte Lovelady*, 207 S.W. 2d 396 (Tex. Crim., 1947), *cert. granted*, 333 U.S. 867, *cert. dism.*, 333 U.S. 897 (1948); *Douthitt* v. *State*, 182 Tenn. 577, 188 S.W. 2d 555 (1945); *State* v. *Bucy*, 104 Mont. 416, 66 P.2d 1049 (1937); *Eastman Kodak Stores, Inc.* v. *Summers*, 377 S.W. 2d 476 (Kan. C.C.A. 1964).

14 See *Jordan* v. *Massachusetts*, 225 U.S. 167 (1912), aff'g. *Commonwealth* v. *Jordan*, 207 Mass. 259, 93 N.E. 809 (1911); *State* v. *Camp*, 110 W.Va. 444, 158 S.E. 664 (1931); *Burik* v. *Dundee Woolen Co.*, 66 N.J.L. 420, 49 A. 442 (1901); *Iverson* v. *Prudential Ins. Co. of Amer.*, 126 N.J.L. 280, 19 A.2d 214 (1941); *State* v. *Welty*, 65 Wash. 244, 118 P. 9 (1911).

> periods during which he entertained the idea of suicide; that he has had to undergo treatment for anxiety reaction to a psychic episode expressed by auditory hallucinations; that he has been under the care of a psychiatrist for an extended period, with little prospect of an early overcoming of his difficulties. [*Id.*, at 293.]

Judge Wyzanski held that the offer of proof was inadequate and denied the plaintiff's motion.[15] The Court of Appeals for the First Circuit agreed, stating that:

> Considering the strong policy against the too-ready impeachment of jury verdicts on the basis of such afterthoughts suggested by a disappointed litigant, . . . the trial judge cannot be held to have abused his discretion in declining to grant a new trial on this ground. [*Id.*]

See also *United States ex rel. Daverse* v. *Hohn*, 198 F.2d 934 (3rd Cir. 1952).

In light of this legal background, we do not believe appellants made enough of a case to justify further inquiry into the competence of Juror Rush. No evidence was offered of any history of mental instability on the part of Miss Rush, much less evidence of any adjudication of insanity or incompetence. Indeed, what we do know of her past, although it is little, reflects quite the contrary situation. She has held steady employment over the past four years as a nurse's aide at Flower Fifth Avenue Hospital, and apparently had steady employment before that as well. The trial judge, as noted above, found the juror alert and responsive and he noted nothing unusual about her during

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15 It is not clear to what extent Judge Wyzanski treated the plaintiff's motion for a new trial in *Peterman* as also being a motion for conducting a hearing into the juror's competency. But evidently no hearing was thought required and none was held.

the three weeks of trial and three days and nights of deliberation. Although the opinions of experts are not to be dismissed altogether, they were here of necessity formed in a vacuum, based on one piece of evidence, and fall far short of constituting the sort of "objective fact" which can justify inquiry into the internal workings of the jury. The fact that there is no evidence of harassment of Miss Rush or solicitation of the letter does not render irrelevant the policy considerations which forbid inquiry into the internal workings of the jury absent objective evidence of impropriety. In another case a letter could be fabricated or solicitation could be disguised; a decision for appellants on this issue would therefore raise very real risks of "inhibition of jury room deliberations, harassment of jurors, and increased incidence of jury tampering." Indeed, even where such a letter is as fully voluntary as the one in this case appears to be, it surely was not thought by its author to be an invitation to "develop evidence by investigating the juror's background or by persuading her to undergo a voluntary mental examination"—the suggestions of the dissent for possible proceedings on remand. We conclude that the action of the district court in denying the defendants' motion was entirely proper.

B—Prosecutor's Comments in Summation

The government prosecutor, in his summation, noted that, apart from the two quasi-character witnesses called by defendant Ostrer, the defendants had called no witnesses to contradict the factual content of the government's case. Defense counsel objected to these remarks, and the appellants argue that the remarks were improper in that only they themselves (or co-conspirators whose testimony they could not compel) could have testified in contradiction to the government's witnesses. We do not agree.

It is true that it has been frequently held impermissible for the prosecution to comment on a defendant's failure to call witnesses where only the defendant could offer counter-testimony or where the jury will "naturally and necessarily" interpret this as a comment upon the defendant's silence, otherwise constitutionally protected. See, e.g., *United States* v. *Lipton*, 467 F.2d 1161 (2d Cir. 1972); *United States* v. *Flannery*, 451 F.2d 880 (1st Cir. 1971); *United States* v. *Handman*, 447 F.2d 853 (7th Cir. 1971); *Desmond* v. *United States*, 345 F.2d 225 (1st Cir. 1965).

However, this danger can be neutralized by a prompt corrective instruction to the jury. Such an instruction was given by Judge Edelstein. Moreover, this was not the close situation in which it was a question of a defendant's word against the word of one other (cf. *Handman*, where the defendant was implicated solely by an informer's testimony about a telephone conversation between himself and the defendant). Thus, even though many of the meetings between Hellerman, Ostrer, Dioguardi, and DiLorenzo were private, their activities also involved numerous stock brokers and other Wall Street figures, several of whom also testified at trial. See fn. 1, *supra*. Given the breadth of the operation, it was not improper for mention to have been made of the dearth of defense witnesses from so large a cast of characters. The record supports the conclusion that there were meetings between the persons involved in the Belmont stock manipulation at which more were present than the defendants and the government's witnesses at trial, and that some of these persons could have been called to testify or at least that in many other ways defendants could have waged factual war with the detailed evidence of the government's witnesses.

In *United States ex rel. Leak* v. *Follette*, 418 F.2d 1266 (2d Cir. 1969), cert. denied, 397 U.S. 1050 (1970) which con-

cerned similar comments by the prosecutor on the strength of the government's case against the accused and on the lack of any contradictory evidence, we reviewed the many precedents which, in almost every instance, have "held that remarks concerning lack of contradiction are forbidden only in the exceedingly rare case where the defendant alone could possibly contradict the government's testimony," *id.*, at 1269, and then concluded that

> where the prosecutor confines himself to arguing the strength of his case by stressing the credibility and lack of contradiction of his witnesses, we will not be astute to find in this a veiled comment on the defendant's failure to testify even if in practical fact, although not in theory, no one else could controvert them. [Id., at 1270.]

The defendants' objections to the prosecutor's comments in summation were properly denied.

C—Specific Charge on Accomplice Testimony

Both defendants argue that it was error for the trial court to have refused to instruct the jury specifically that the testimony of accomplices who were confessed perjurers or convicted felons was to be scrutinized with particular care. There is no merit to this argument. The trial court's charge to the jury was amply cautionary on this point. A similar charge was recently sustained by us in *United States* v. *Projansky*, 465 F.2d 123, 136-137 and nn. 24-25 (2d Cir.), cert. denied, 409 U.S. 1006 (1972).

D—The Evidentiary Ruling

At one point in the trial Hellerman testified that Dioguardi had used some of the proceeds of the Belmont stock scheme to help pay off a mortgage on his summer home.

Apparently this statement was incorrect. To help pay off the mortgage Dioguardi had used funds obtained through a prior stock manipulation, but one on which he had been acquitted at a previous trial. At the side bar, counsel for Dioguardi argued that the prosecution should correct Hellerman's testimony. The trial court stated that correction was properly the responsibility of defense counsel. Dioguardi's lawyer, however, was unwilling to raise the issue unless proof could also be introduced of the earlier acquittal. The trial judge at this point expressed himself somewhat ambiguously, and the parties differ whether we should read him as having refused to give a ruling in advance on the question whether he would allow proof of acquittal, holding that admissibility would depend on the course of testimony, or as having held that proof of acquittal would not in any case be admissible in this context. In either event, as a consequence of the trial judge's action, Hellerman's testimony was allowed to stand, and the issue was not raised again.

Dioguardi claims that the court's ruling or failure to rule was improper and that it permitted false testimony to reach the jury. This claim, while perhaps technically valid, is essentially groundless. The circumstances behind the controversy at issue were never pursued in testimony in open court. No facts behind it were ever in evidence. While the record does reveal occasional allusions to the prior stock manipulation, the so-called "Imperial deal," none of these could be considered prejudicial in reference to Dioguardi. Hellerman's statement was *de minimis* in view of the other evidence. No reversible error was committed by the trial court under the circumstances. It was a matter fully within the trial court's discretion. See *United States* v. *Kahn*, 472 F.2d 272, 282 (2d Cir.), cert. denied, 411 U.S. 982 (1973).

E—Consecutive Sentences for Stock Fraud

Lastly, Dioguardi claims that it was improper for the trial court to impose separate consecutive sentences and separate fines upon him for the violations in counts 16 and 17 of the indictment. Count 16 involved confirmation of the purchase in Ostrer's name, with Dioguardi's approval, of 2000 shares of Belmont stock through Bruce & Co. on March 10, 1970. Count 17 involved confirmation of the similar purchase of 3500 shares through Kelsey & Co. on March 11th. See fn. 6, *supra*. Dioguardi argues that these purchases, and their confirmations, were part of a single transaction, namely Ostrer's purchasing half (14,000) of the supposed outstanding shares of Belmont stock, and that hence they cannot constitute separate violations of the securities laws.

It is true that there has been debate in the past over whether such transactions constitute a multiple offense, the essence of the violation being illegal use of the mails, or a single offense, the essence being fraud. See 3 Loss, Securities Regulation 1521 (2d ed., 1961); and also *United States* v. *Hughes*, 195 F.Supp. 795 (S.D.N.Y. 1961). However, recent litigation involving fraud under the securities laws has resolved this debate in favor of the position that each transaction in a securities fraud case constitutes a separate offense. *United States* v. *Sanders*, 415 F.2d 621 (5th Cir. 1969), cert. denied, 397 U.S. 976 (1970); see also *United States* v. *Binstock*, 37 F.R.D. 13 (S.D.N.Y. 1965). This position acknowledges the fact that activity such as the kind Dioguardi engaged in here in relation to the two Ostrer purchases on March 10th and 11th was fraudulent in each instance, not necessarily in respect to the scheme as a whole, nor even necessarily in respect to the sellers on those two days (who may have been co-conspirators or perhaps simply others pleased to sell at

a gain), but in respect to the investing public. Thus although a situation can be envisioned in which consecutive sentences on multiple fraud convictions would be questionable, *cf. United States* v. *Brown*, 36 F.R.D. 207 (D.D.C. 1964), in the instant case the determination and sequence of the sentences imposed on defendant Dioguardi were matters within the discretion of the trial court. See *Sanders* v. *United States, supra*, at 626, and the cases there cited. The consecutive sentences on counts 16 and 17 were therefore proper.

Judgments of conviction affirmed.

FEINBERG, *Circuit Judge* (dissenting):

The majority opinion holds that an unsolicited, bizarre letter from a juror, who claims to be able to "see things before it happen" and to know what other people "are thinking," does not justify further inquiry into the juror's competence, even though seven psychiatrists preliminarily diagnose her as mentally ill. From this holding, I emphatically dissent.

There is no need to rehearse in great detail the basic principles of law that govern the issue before us. As the majority points out, after a trial is over, there is a great judicial "[r]eluctance to inquire into the state of mind of any juror[s] . . . during their deliberations," and that reluctance rests upon "sound reasons." But reluctance to inquire is not the same as obdurate refusal to face facts, especially such "objective" facts as a rambling, unsolicited letter, sent 13 days after verdict, that strongly suggests severe mental illness. A close look at that letter and the comments upon it of the seven doctors, whose six letters and one affidavit were submitted to the district judge, is instructive.

The letter from juror Rush was written on stationery which bears the Zodiac sign "Libra" at the top over a picture of a woman holding scales. It stated as follows:

February 8th—1973

Dear Mr. Dioguardi,

Under the situation and such circumstance I hope that I have made the right decision. I talk to my friends Bertha and her husband Olive about this. Olive agree that I write to you. Bertha, however, was against it. Nevertheless, I felt I had to write you. I cannot omit what I have seen. When I saw the good within you and how hard your wife was trying; I prayed about it. One word appear before me *repent*. If you repent and run a clean business it is the good within you that will save you, and you will gain what you have lost. Before I continue I must explain something to you. I have eyes and ears that I can see things before it happen. I can tell you about other and what they are thinking and doing. If I am wrong about this it is the first time.

I would like to visit you. I would like to do so when my eyes fully open. I would like to talk to you about what appear before me. They are only partly open. I don't know at the present when they will open. Unfortunate, a curse was put upon them some years ago. I have some people working on them. Everything is being done that can be done. So we will have to wait. As I stated I cannot omit what appear before me, when I was on the jury bench. You feel that this is the end for you. However, it is not. Something appear before me that I must do. It is the good within you that I must use and within that good, you will gain what you have lost. If, however, I am wrong it is the first time.

Why, you let such a relationship exist between you and a man like Hellerman? When I think of the good that I saw within you it does not add up. Where did Hellerman get those fur coats? Does he have any for sail? Omit the question. I really can't afford one, and if I could I probably be afraid to wear it.

Why persecute your wife? Your mistake your guilty then take it out on her. The ordeal you put her through I wonder how she survive through it. One word appear before me brave. She is a brave girl. She love you. She never stop loving you not a single moment. Tell her to please be careful. From what I can see she is still in business. I suggest it is not wise at this time. I believe she is being watch.

That was a good lawyer you had. I entain to send him some custom as soon as my eyes open.

Tell Ostrer I am praying for him.

Mr. Dioguardi, I want to ask a favor of you please.

I want you to look upon me as a woman and I look upon you as a man and not white man and black woman. Olive agree with me.

Let's leave color out, *OK*.

I was told you will only have to serve one third of the time given. So relax this is not the end. Soon you will be free.

When I call the Federal information center and the record room yesterday they all know you. They all seem to have it in for you. Its seated deep within them like a personal matter.

Sincerely,

Genena

Thus, the juror claims that she has "eyes and ears that . . . can see things before it happen." She can "tell"

what other people "are thinking and doing." Her eyes are now "only partly open" because "a curse was put upon them some years ago." She is writing this letter because "[s]omething appear before me that I must do." Although Dioguardi's wife was never in the courtroom, the juror somehow knows that Mrs. Dioguardi "is a brave girl" and "is still in business," but is being watched. As soon as the juror's "eyes open" she intends to send Dioguardi's lawyer some customers. And when she "saw the good within" Dioguardi and how hard his wife "was trying," the word *"repent"* appeared before her.

The letter is staggering in its implications. No special training is needed to appreciate that this juror seems to believe she is clairvoyant and can see things that may not, or could not, be apparent to others, such as what people think or an event before it happens. And if juror Rush actually did believe she was clairvoyant in this way, is it really necessary to spell out why she could not fairly try the guilt or innocence of any man? It seems obvious to me that a "clairvoyant" juror might honestly "see" a defendant's guilt despite the lack of evidence because she can see into the defendant's mind. Or conversely, she might for the same reason divine a defendant's innocence, in the face of overwhelming proof of guilt. A person who was known to regard herself as clairvoyant would certainly not be allowed on a jury in the first place. *United States* v. *Silverman*, 449 F.2d 1341, 1344 (2d Cir. 1971), cert. denied, 405 U.S. 918 (1972); *United States* v. *Benson*, 31 Fed. 896, 900 (D. Cal. 1887). Such a woman would clearly be "incapable, by reason of mental . . . infirmity, to render satisfactory jury service . . ." under 28 U.S.C. § 1865(b)(4). Cf. *Jorgensen* v. *York Ice Machinery Corp.*, 160 F.2d 432, 435 (2d Cir.), cert. denied, 332 U.S. 764 (1947). Moreover, the incapacity on such a ground of even one juror would poison the ver-

dict regardless of the competence of the remaining 11. *Parker* v. *Gladden*, 385 U.S. 363, 366 (1966) (per curiam); *United States* v. *Rattenni*, 480 F.2d 195, 198 (2d Cir. 1973).

The ultimate question, of course, is whether juror Rush was in fact "incapable" of rendering satisfactory jury service, but the precise legal issue before us is whether enough was presented to the district judge to require holding a hearing to determine her capacity to serve. The district court had before it the juror's letter and the views of seven reputable psychiatrists, all of whom rendered expert opinions that the writer of the letter suffered from severe mental illness.[1] According to some of these doctors, the precise diagnosis of her problem would require clinical evaluation through interviews and tests, but all of the psychiatrists agreed on the existence of a seriously disabling thought disorder which in their opinion would have impaired her mental functioning during the trial and her ability to judge the case intelligently. These expert views stand uncontradicted on the record before us. True, the majority opinion refers to them as "essentially horseback uninformed." However, in view of the district judge's oral order, not mentioned in the majority opinion, that no one was to contact the juror,[2] these adjectives are simply not justified. Several of the psychiatrists made clear that they would like to know more about the juror. Obviously, the directive prevented defense counsel from attempting any interview, and both defense and government counsel apparently interpreted the order as inhibiting any investigation of the juror, even apart from talking to her.

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1 The credentials of the seven psychiatrists were set forth in varying detail, but, on this record, all appear to be qualified to give an expert opinion.

2 The judge stated in open court that juror Rush

> is not to be contacted by anybody or communicated with by anybody in any possible way, directly or indirectly. Is that clear, gentlemen?

The combined effect of the uncontradicted record and the apparently intended scope of the judge's order requires a remand for a further hearing. The unsolicited letter is bizarre, and seven psychiatrists have given their opinion on the basis of it that the juror was seriously mentally ill during the trial. I do not see how the district court, or we, can disregard these facts. Certainly a defendant is entitled to 12 sane jurors, *Parker* v. *Gladden, supra,* 385 U.S. at 366; *United States* v. *Rattenni, supra,* 480 F.2d at 198, and if one is incompetent, we should exercise our supervisory power to order a hearing or a new trial just as we would if one turned out to be blind or deaf although no one had noticed it. Possibly this juror is not incompetent; she may just be peculiar. But the record as it now stands cannot justify such a conclusion. It may be that after the record is amplified—at least by cross-examination of appellants' witnesses and by testimony of government experts—the district court might be warranted in finding juror Rush to have been capable of jury service. I express no view as to that. However, at the very least, defendants are entitled to a full hearing on the issue of the juror's competence.

The majority cites a good deal of authority for the proposition that unless there is "substantial if not wholly conclusive evidence" of a juror's incompetence during trial, a post-trial inquiry will not be ordered "merely on the allegations and opinions of a losing party." See, e.g., *Peterman* v. *Indian Motorcycle Co.,* 216 F.2d 289 (1st Cir. 1954). I do not quarrel with this statement of the law. Indeed, I heartily endorse it since the evidence on this record of the mental incompetence of juror Rush is, as I have indicated, quite "substantial." Moreover, the inquiry here was not triggered solely by "the allegations and opinions of a losing party," but by the unsolicited letter of the jury herself, which was sent only 13 days after the verdict and is itself

persuasive evidence of incapacity.[3] None of the decisions cited by the majority involved such an unusual objective fact. In *Peterman, supra,* for example, there was no communication by the juror, which was itself an overt symptom of mental disorder. On the contrary, there was "no suggestion that the juror was insane," 216 F.2d at 293, whereas here the uncontradicted record supports the opposite conclusion. Furthermore, in many cases of alleged juror taint, hearings were actually held or ordered upon remand. See, e.g., *Remmer* v. *United States*, 347 U.S. 227 (1954); *United States* v. *Hand*, 472 F.2d 162 (5th Cir. 1973) (per curiam); *United States* v. *Silverman*, supra; *United States ex rel. Owen* v. *McMann*, 435 F.2d 813 (2d Cir. 1970), cert. denied, 402 U.S. 906 (1971). Cf. *Smith* v. *Cox*, 435 F.2d 453 (4th Cir. 1970), vacated on other grounds sub nom. *Slayton* v. *Smith*, 404 U.S. 53 (1971).

I would only add the observation that, far from loosing a Pandora's box of challenges to jury verdicts (as the district court feared), a remand for a hearing here would have almost no precedential value because of the uniqueness of the facts. Nor would a hearing under these circumstances raise the twin spectres of juror harassment or incursion on jurors' privacy during their deliberations. Cf. *Miller* v. *United States*, 403 F.2d 77, 82 (2d Cir. 1968). The letter which forms the basis of the present attack on the verdict below was, as I have stressed, unasked for, and not the product of a fishing expedition. Moreover, an inquiry into competence need not entail a probe of jury discussions. I have already mentioned such alternative possibilities of enlarging the record as cross-examination of appellants' witnesses and testimony by government experts. Counsel may also develop evidence by investigating the juror's back-

3 There is no hint in the record that the letter was actually solicited or not genuine. Upon remand, those questions could, of course, be explored.

ground or by persuading her to undergo a voluntary mental examination. I see no need to explore every conceivable avenue of investigation, but merely wish to make the point that I am not counseling any general break with the wise policy of protecting the sanctity of the jury room and the privacy of individual jurors.

For these reasons, I strongly believe that the district court erred in refusing to make further inquiry into the competence of juror Rush. Therefore, I dissent from the affirmance of the order denying a new trial without a hearing.[4]

4 I agree with the majority's disposition of the other points raised by appellants.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

-against-

JOHN DIOGUARDI and LOUIS OSTRER,

Defendants.

EDELSTEIN, Ch. J.

OPINION

Defendants John Dioguardi and Louis Ostrer were indicted on May 27, 1971, and brought to trial on January 4, 1973 for conspiring to violate and for violating the federal securities laws[1] and regulations[2] and the federal mail fraud statute.[3] On January 26, 1973, after three days of deliberations, a jury returned verdicts of guilty against both defendants.[4] Defendants have now moved for a new trial, pursuant to F.R.Cr.P. 33,[5] on the ground that one of the jurors suffered from "a mental infirmity making her incapable of rendering efficient jury service" within the meaning of 28 U.S.C. 1865(b)(4).[6]

In support of their motion, defendants rely upon a letter which was sent to Dioguardi by the juror in question. The letter portrays the juror as a person with religious feelings who believes herself

to be a clairvoyant. This clairvoyance, according to the letter, has enabled the juror to conclude that Dioguardi is basically a good person. (The juror repeated the phrase " . . . I saw the good within you. . ."). Nevertheless, the juror affirms her belief that Dioguardi is guilty ("Your mistake your [sic] guilty."); admonishes him for becoming involved with criminals ("Why you let such a relationship exist between you and a man like Hellerman?")[7] and suggests that he should repent and be saved. ("If you repent and run a clean business it is the good within you that will save you, and you will gain what you have lost.")

Defendants have also submitted six letters from six different psychiatrists and an affidavit from a seventh psychiatrist. Based only upon an analysis of the juror's letter and, in some instances, an assumption of the juror's religious feelings, cultural background and intelligence level, the doctors offered, in various ways, their opinion that the juror is, and was during trial, hallucinatory, delusional, psychotic, grandiose and suffered from guilt feelings and a persecution complex; and they attempted to make the legal determination that the juror was not mentally qualified to serve on a jury.

Defendants have requested that this court either (a) hold a hearing "with necessary mental examination" to determine whether the juror was unqualified to serve, and to grant a new trial "should the juror be found to have been unqualified;" or (b) grant a new trial even if the court refuses to hold a hearing.

The demand for a new trial based upon a post-verdict attack on a juror's mental competency is an issue of first impression in this circuit. The problem, however, has been considered by the highest tribunals of fourteen states,[8] an intermediate apprllate court in one other state,[9] and by the Courts of Appeals for the First Circuit[10] and Third Circuit.[11] The decisions rendered by these courts all are to the effect that a post-verdict *inquiry* into a juror's mental competency will not be permitted unless the party seeking to set aside the jury's verdict makes a strong showing as to the existence of the alleged mental infirmity. At a minimum, this showing should be sufficient to overcome the legal presumption that all men are sane.[12] An analysis of the relevant cases reveals no precise formula by which to measure the standard of proof necessary to warrant a post-verdict investigation. They do reveal, however, a difference between a sufficient and an insufficient showing.

These cases can be divided into three categories, ranging in degree from the strongest to the weakest showings which have been made in attacking a juror's competency. The strongest showing is illustrated by fact patterns in those cases in which the juror, prior to trial, had been adjudged mentally incompetent; had spent time in a hospital for the mentally ill; and had not been legally restored to competency during the period of his jury service. In such cases, the mere adjudication of incompetency, without a restoration to competency, regardless of the period of time which had elapsed between the date of the adjudication and the date of jury

service, was sufficient to overcome the presumption that the juror was sane during the trial.[13] In these circumstances, the courts have held a post-verdict investigation to ascertain the extent to which the disability existed during trial, and the effect the disability had on the juror's consideration of the facts of the case.[14]

The second category of cases involves jurors who have been declared insane shortly after the verdict was rendered. The adjudications were by an independent tribunal, and the proceedings were completely unrelated to the post-verdict investigation of the jurors' qualifications. As in the first category of cases, the presumption of sanity had been overcome. However, an adjudication of incompetency does not determine a person's mental capacity prior to the determination. Yet, the inference is clear that the underlying causes of the incompetent condition existed before the adjudication. Thus, in this category of cases, due process requires[15] that there be a hearing to establish whether the disability existed during trial, and if it did exist, the effect it had on the juror's deliberations.[16]

Absent the type of showing demonstrated in the first two categories, the courts have been extremely reluctant to invade the privacy of the jury room. Thus, the Court of Appeals for the First Circuit, in *Peterman v. Indian Motorcycle Co.*, 216 F.2d 289 (1st Cir. 1954), the Court of Appeals for the Third Circuit, in *United States ex rel. Daverse v. Hohn*, 198 F.2d 934 (3rd Cir. 1952), and the Supreme Court of New Mexico, in *State v. Eskildson*, 36

N.M. 238, 13P.2d 417 (1932), approved the trial court's refusal to hold an evidentiary hearing absent an adjudication of incompetency. In *Peterman*, the movants offered to prove that

> . . . the juror in question, because of mental disturbance, [had] been receiving disability compensation from the Veterans Bureau, that he [had] difficulty in sleeping and concentrating; that his memory [was] not good; that he [had] had depressed periods during which he entertained the idea of suicide; *that he [had] had to undergo treatment for anxiety reaction to a psychic episode expressed by auditory hallucinations; that he has been under the care of a psychiatrist for an extended period, with little prospect of an early overcoming of his difficulties.*

216 F.2d at 293 (emphasis added). Yet, Judge Wyzanski of the United States District Court for the District of Massachusetts refused to hold an evidentiary hearing. According to the opinion of the Court of Appeals, Judge Wyzanski's reason was based upon the fact that the offer of proof. "taken at its face value," did not present "a sufficient ground for impeaching a verdict once returned" because it "contained no suggestion that the juror was insane or had at any time been confined in a sanitorium 'or was so incapacitated that he did not perform as adequately as many people do ordinary occupational tasks.'" *Id.* The

Court of Appeals noted that Judge Wyzanski observed the juror during the trial and that he did not get the impression that the juror was incompetent. In its affirmance, the Court of Appeals indicated its approval of " "the strong policy against the too-ready impeachment of jury verdicts on the basis of such afterthoughts suggested by a disappointed litigant." *Id.*

Similarly, in *Eskildson*, defendants sought to establish a juror's mental incompetency through the testimony of a psychiatrist. The trial court, however, refused to hold an evidentiary hearing because there had not been "an adjudication that settled [the juror's] status." 13 P.2d at 421. The Supreme Court of New Mexico, while sanctioning the adjudication requirement adopted by the trial court, suggested that a hearing might also be appropriate if the trial judge believed, based upon his observations of the juror during trial, that the juror was incompetent.[17]

Finally, the Third Circuit's opinion in *Daverse*, although not precisely on point, is consonant with the policy reflected in *Peterman* and *Eskildson*. In *Daverse*, the defendant attempted to amend a paragraph of a petition for habeas corpus by adding an allegation that the juror suffered from a mental disease. This proposed amendment, however, was framed in uncertain, rather than specific, language (" . . . [the] juror . . . *may* be suffering from a mental disease. . . .") 198 F.2d at 937 (emphasis added). Focusing upon the failure to allege "specifically that [the juror] was in fact

mentally incompetent or 'insane,'" the Court of Appeals affirmed the District Court's refusal to allow the amendment. In so doing, the court stated:

> If a juror's mental competence is to be attacked at the late stage offered by a habeas corpus proceeding, the charge must be made in much more certain terms and not on a tentative basis. A fishing expedition into a juror's competency may not be employed as a basis to attack a conviction valid on its face. To rule otherwise would be to strike a serious blow at the sanctity of the jury system for any juror, who it was alleged might be suffering from paranoid tendencies, could in effect be put on trial as to his mental competence. We cannot sanction such a course.

198 F.2d at 938 (citation omitted). Clearly, something more than just a bare statement of incompetency is demanded. At a minimum, a party attacking a juror's qualifications must make an offer of proof which, as the First Circuit stated, suggests "that the juror was insane or had at any time been confined in a sanitorium 'or was so incapacitated that he did not perform as adequately as many people do ordinary occupational tasks.'" 216 F.2d at 293. It would be myopic to read the *Daverse* opinion as requiring anything less than a strong showing of mental incapacity. It makes little difference, absent such a strong showing, whether movants

charge that a juror *is* suffering from a mental disease or that the juror *may be* suffering from a mental disease. In both instances, the effect of defendant's attack is the same: permission to employ a "fishing expedition into a juror's competency" would be required. Such an expedition cannot be tolerated.

A comparison of the offer of proof in the case at bar with the offers made in the cases above should make it abundantly clear that the defendants' offer of proof is insufficient to warrant a post-verdict inquiry into the juror's mental competency. Since there has been no adjudication of incompetency, this case comes within the weakest of the three categories discussed above. Even within this category, the showing is extremely weak. In *Peterman*, for example, the offer of proof was much stronger than the offer made here. There, the allegations were, in effect, that the juror had a history of mental disturbances, and had been, prior to and throughout the trial, under the care of a psychiatrist. Yet, Judge Wyzanski and the First Circuit were in accord that these allegations, even if true, would not warrant the impeachment of the verdict. 216 F.2d at 293. Here, there is no indication that the juror has a history of psychiatric disorders or that the juror has undergone psychiatric treatments. At best, the defendants' position is comparable with the defendant's position in *Daverse*: a bare allegation of incompetency combined with a request that the court conduct an investigation. To permit a post-verdict inquiry based upon defendants' offer of proof would

be to accept the proposition that a fishing expedition may be employed to attack a conviction valid on its face. This cannot be countenanced, particularly in light of *Peterman* and *Daverse*.

Moreover, based upon an examination of the general case law governing a post-verdict inquiry into a juror's qualifications, it is clear that a hearing is not required. The purpose of a hearing is not to determine whether or not the claimed disability does exist. Rather, the function of a hearing is to ascertain the extent to which the disability existed during trial, and the effect the disability had upon the juror's deliberations. This view finds support in the Supreme Court's opinion in *Remmer v. United States*, 347 U.S. 227 (1954). During the trial in *Remmer*, an improper communication was made to a juror and was reported immediately to the court. Improper communications, such as those involved in *Remmer*, have been deemed to be so presumptively prejudicial as to require a new trial.[18] Yet, the trial court never informed the defendant-petitioner of the incident. Instead, based upon the results of a requested F.B.I. investigation, the court concluded that the incident was harmless. Upon learning of these events after trial, the defendant-petitioner moved for a new trial. Without holding a hearing, the trial court denied the motion and the Ninth Circuit affirmed. 205 F.2d 277 (9th Cir. 1953). The Supreme Court, however, held that a hearing was necessary--not to determine whether the incident occurred--but rather to "determine the circumstances [surrounding the incident], the impact thereof upon the

juror, and whether or not it was prejudicial." 347 U.S. at 230.

This concept of the limited purpose of a hearing is also suggested by the Second Circuit's decision in *United States v. Silverman*, 449 F.2d 1341 (2d Cir. 1971). There the court indicated that a hearing would be necessary--again, not to determine whether a claimed disqualification existed--bur rather to determine whether "the claimed disqualification might have adversely affected the challenged juror's ability to decide the case intelligently." 449 F.2d at 1344. In *Silverman*, an income tax evasion case, the juror's inability to read and write English was not disputed. At the hearing, therefore, the only question facing the court was whether this disability precluded the juror from rendering a fair and impartial verdict.

Similarly, in other cases involving a post-verdict attack upon a juror's qualifications, the existence of the disabling condition was not in issue, for the factors relied upon as being responsible for the disabling condition were readily evident.[19] Thus, where the juror suffered from a physical impairment, the existence of the impairment was not disputed. Where the juror was unable to read or write, this inability was not controverted. Where the juror was an alien, infant or convicted felon, the alienage, infancy or conviction of the juror was not in issue. Where the juror had engaged in some form of misconduct, the fact that the misconduct occurred was not questioned. And where the juror's mental competency was determined in a separate and unrelated proceeding, mental capacity was not contested.

What was questioned and what was contested though, was the extent to which the disqualifying factor tainted a juror's deliberations and prevented him from rendering a fair and impartial verdict.

In the instant case, however, where the juror's competency has not been determined in a separate and unrelated proceeding, the court would be constrained to perform the additional task of delving into the mind of the juror and making the initial determination of whether or not the juror was mentally competent.[20] Such a probe was not undertaken in *Peterman*, *Eskildson* and *Daverse*; and the court would be ill-advised to undertake such a probe here. Testimony would be necessary at the very least, not only from the subject juror regarding her deliberations, but also from her fellow jurors, regarding the nature and extent of the subject juror's participation in the deliberations.[21] Yet, such a probe militates against the well-established general rule which inhibits a court from inquiring "in any way whatever as to what occurred during the jury's deliberations." *United States v. Grieco*, 261 F.2d 414, 415 (2nd Cir. 1958), *cert. denied* 395 U.S. 907 (1959). Indeed, it is axiomatic that jurors are incompetent to testify as to matters which would impeach their verdict, regardless of the means employed.[22] Hence, courts have consistently refused to consider letters and affidavits of jurors which attempt to impeach their verdict.[23]

These general rules, however, are not absolute. The Supreme Court, having recognized that the adherence to inflexible rules is incompatible with the administration

of justice, has relaxed the rigidity of these rules in order to protect the defendant's Sixth Amendment right to a fair and impartial jury. *McDonald v. Pless*, 238 U.S. 264, 268-269 (1915). Nonetheless, post-verdict inquiries remain limited to extraordinary circumstances in which fundamental incompetency or actual bias is shown.[24] Thus, to come within this high standard, "[t]here must be a showing of a *prima facie* case sufficient to satisfy the judge that the [exposure of the jury's discussions d during deliberations] should be let in." *Clark v. United States*, 289 U.S. 1, 14 (1932). The alleged disability must be "so obvious a disqualification or so inherently prejudicial as a matter of law . . . to require the court, of its own motion or on petitioner's suggestion afterward to set the verdict aside and grant a new trial."[25]

It has been said that the showing must be of a "constitutional dimension." *United States v. Provenzano*, 240 F.Supp. 393, 408 (D.N.J.); *aff'd per curiam* 353 F.2d 1011 (3rd Cir. 1965), *cert. denied*, 384 U.S. 905 (1966). The mere allegation of the existence of a disability, the "mere charge of a wrongdoing . . . without more," *United States v. Silverman*, 449 F.2d 1341, 1344 (2d Cir. 1971), the mere inclusion in the panel of a disqualified juror, *United States v. Clark*, 289 U.S. 1, 14 (1933), does not warrant the disclosure of the debates, thoughts and votes of the jury while considering their verdict.[26] Clearly, post-verdict statements of a juror, without more, which reflect certain beliefs, considered by some to be unconventional, neither

meet the high standards mandated by the Supreme Court and the Second Circuit; nor justify tearing down the veil of secrecy which properly protects the jury's deliberations.

Furthermore, if the jurors were permitted to testify, questions relating to the motives and influences which affected their deliberations would be improper. As Judge Timbers has pointed out

> Few doctrines are more firmly established in our jurisprudence than the proposition that the validity of a verdict may not be attacked, and hence a new trial will not be granted, upon a showing of the mental operations and emotional reactions of jurors in reaching a particular verdict.

United States v. Reed, 313 F.Supp. 451, 454 (D. Conn. 1970). This rule, which was adopted by the Supreme Court in *Mattox v. United States*, 146 U.S. 140 (1892), has been consistently reaffirmed both by the Supreme Court[27] and the Second Circuit.[28] *Mattox* drew the distinction between proper and improper testimony: testimony as to *objective* matters ("any facts bearing upon the question of the existence of any extraneous influences") was declared to be proper; however, testimony as to *subjective* matters ("how far that influence operated upon his [the juror's] mind") was deemed to be improper. 146 U.S. at 149.

The refusal of the Second Circuit

to deviate from this rule is amply supported by their decisions. In *Rotondo v. Isthmian Steamship Co.*, 243 F.2d 581 (2d Cir. 1957), a *per curiam* opinion, the court refused to allow a post-verdict examination of the jury, stating

> it is completely well settled that, when objection rests upon the jurors' testimony as to what were the reasons that in fact induced them to find their verdict, the court will not hear them.

243 F.2d at 583 (citations omitted). Moreover, in *United States v. Crosby*, 299 F.2d 928 (2d Cir. 1961), *cert. denied sub. nom. Mittelman v. United States*, 368 U.S. 984 (1962), the *Mattox* subjective-objective limitation on the scope of inquiry was specifically relied upon in rejecting a request for a post-verdict examination of jurors. In *Crosby*, the defendants claimed that the jury's deliberations were tainted by the use and knowledge of information obtained from news accounts. Citing *Mattox*, the Court of Appeals acknowledged that juror testimony could be received "to prove the fact that they read the newspapers," 294 F.2d at 949, but not to establish the effect of such knowledge upon their reasoning.[29] Thus, as Judge Friendly declared in *Miller v. United States*, 403 F.2d 77 (2d Cir. 1968), "any relaxation of the *Mattox* rule" relating to a post-verdict inquiry into a juror's mental process would be viewed with "apprehension" by this court. 403 F.2d at 84 n. 11.

Continued adherence to these rules

is reasonable. To permit a disappointed litigant to distort certain facts, innocent on their face, as a basis for attacking a jury's verdict, would be to open the proverbial Pandora's box. As Judge Smith said in *Crosby*, and Judge Friendly subsequently adopted in *Miller*,

> There are many cogent reasons militating against post-verdict inquiry into jurors' motives for decision. The jurors themselves ought not be subjected to harassment; the courts ought not be burdened with large numbers of applications mostly without real merit; the chances and temptations for tampering ought not be increased; verdicts ought not be made so uncertain.

United States v. Crosby, 294 F.2d at 950; *Miller v. United States*, 403 F.2d at 82.[30] In addition, to permit a verdict to be reopened without a sufficient basis in fact, would be to seriously impair the integrity of a verdict. And, by diluting the efficacy of a jury's pronouncement, the constitutional guarantee of trial by jury, asserted by defendants, would also be weakened; for the integrity of a jury's verdict is an undeniable cornerstone of this Sixth Amendment right. *Cf. United States ex rel. Daverse v. Hohn*, 198 F.2d 934, 938 (3rd Cir. 1950). Therefore, before an assault on a verdict receives judicial approval, the Supreme Court's warning in *McDonald v. Pless* should be considered:

> But let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation--to the destruction of all frankness and freedom of discussion and conference.

238 U.S. at 267-268.

Considering the instant case, I do not believe that the facts justify the reopening of the jury's verdict. Defendants have not offered any evidence of a separate, unrelated determination of mental incompetency. Nor have they sustained their burden of overcoming the presumption of sanity which protects the juror. The most that can be said of their shallow showing is that it invites a "fishing expedition into a juror's competency." This cannot be countenanced. Moreover, there was nothing in the demeanor of the juror during *voir dire*, trial or deliberations to indicate

that she was anything but competent to serve on the jury. On *voir dire*, the jurors were asked group questions in an effort to elicit from them their feelings of bias or prejudice which would prevent them from rendering a fair and impartial verdict.[31] In direct colloquy with me, the juror answered directly and responsively, stating that she understood my questions and comments, and specifying the particular ones which applied to her. Nothing in her responses and demeanor indicated that her reasoning abilities or mental processes were deficient. Indeed, her ability to recall my questions applicable to her, conveyed the opposite impression. Likewise, during the three weeks of trial and three days and nights of deliberations, I did not notice anything unusual about her. Nor was anything unusual concerning her brought to my attention by either the attorneys or jurors. (I might add that the attorneys and the jurors were always quick to bring matters to my attention which they thought of moment).

The defendants' second request that the verdict be set aside even without a hearing is utterly without foundation. A showing which is too weak to permit an inquiry into the jury's deliberations is, *a fortiori*, too weak to warrant a new trial. Also, based upon a comparison of the facts of this case with the facts of those cases in which mental incompetency was alleged by movants and rejected by the courts, it is clear that defendants' showing is too weak to justify setting aside the verdict.

Accordingly, defendants' motion is denied.

So ordered.

DAVID N. EDELSTEIN
Chief U.S.D.J.

Dated: New York, New York
July 18, 1973

Footnotes

1 Section 17(a) of the Securities Act of 1933, prohibiting fraud in the sale of securities. 15 U.S.C. § 77q(a) (1970). Wilful violation of this section is made criminally punishable by section 24 of the Securities Act of 1933, 15 U.S.C. § 77x (1970).

2 Securities and Exchange Commission Rule 10b-5, prohibiting fraud in the purchase and sale of securities. 17 C.F.R. Section 240.10b-5, promulgated under 15 U.S.C. § 78j(b) (1970). Wilful violation of this rule is made criminally punishable by section 32(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78ff (1970).

3 17 U.S.C. § 1341 (1970), the federal mail fraud statute.

4 The jury found Ostrer guilty of 11 of the 17 counts submitted to them for their consideration; and Dioguardi guilty of 4 of the 19 counts submitted to them for their consideration.

5 Rule 33 of the Federal Rules of Criminal Procedure states:

> The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be

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made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.
As amended Feb. 28, 1966, eff. July 1, 1966.

6 Section 1865(b)(4) states, in pertinent part:

> (b) In making such determination [whether a juror is qualified to serve] the chief judge of the district court, or such other district court judge as the plan may provide, shall deem any person qualified to serve on grand and petit juries in the district court unless he -- . . . .
>
> (4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service. . . .

7 Michael Hellerman was the admitted architect of the scheme for which the defendants were convicted and was a key witness for the prosecution.

8 *Arizona*: Anderson v. State, 54 Ariz. 387, 96 P.2d 281 (1939); *Arkansas*:

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Brown v. State, 219 Ark. 647, 243 S.W. 2d 938 (1951); Grand Lodge A.O.U.W. of Ark. v. Wood, 113 Ark. 502, 168 S.W. 1070 (1914); *Colorado*: Austin v. People, 106 Col. 506, 107 P.2d 798 (1940); *Georgia*: Wall v. State, 126 GA. 549, 55 S.E. 484 (1906), (the Georgia Court of Appeals, an intermediate appellate court, reaffirmed the *Wall* decision in Newton v. State, 66 Ga. 103, 17 S.E. 2d 102 (Ct. App. 1941)); *Illinois*: Mackin v. People, 115 Ill. 312, 3 N.E. 222 (1885); *Indiana*: Douthitt v. State, 144 Ind. 397, 42 N.E. 907 (1896); *Massachusetts*: Commonwealth v. Jordan, 207 Mass. 259, 93 N.E. 809 (1911), *aff'd.* Jordan v. Massachusetts, 225 U.S. 167 (1912); *Montana*: State v. Bucy, 104 Mont. 416, 66 P.2d 1049 (1937); *New Jersey*: Iverson v. Prudential Ins. Co. of America 126 N.J.L. 280, 19 A.2d 214 (1941); Burik v. Dundee Woolen Col, 66 N.J.L. 420, 49 A. 442 (1901); *New Mexico*: State v. Eskildson, 36 N.M. 238, 13 P.2d 417 (1932); *Tennessee*: Durham v. State, 182 Tenn. 577, 188 S.W. 2d 555 (1945); *Texas*: Ex Parte Lovelady, 152 Tex. Crim. 93, 207 S.W. 2d 396 (1947), *cert. granted* 333 U.S. 867, *cert. dismissed* 333 U.S. 879 (1948); McKenzie v. State, 116 Tex. Crim. 395, 11 S.W. 2d 172 (1928); Carter v. State, 102 Tex. Crim. 517, 278 S.W. 840 (1925); *Washington*: State v. Welty, 65 Wash. 244, 118 P. 9 (1911); *West Virginia*: State v. Camp, 110 W. Va. 444, 158 S.E. 664 (1931).

9 *Missouri*: Eastman Kodak Stores, Inc. v. Summers, 377 S.W. 2d 476 (Kan. City Ct. App. 1964).

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10 Peterman v. Indian Motorcycle Co., 216 F.2d 289 (1st Cir. 1954).

11 United States ex rel. Daverse v. Hohn, 198 F.2d 934 (3rd Cir. 1952), *cert. denied* 344 U.S. 913 (1953).

12 *See, e.g.* David v. United States, 165 U.S. 373, 377-378 (1897); David v. United States, 160 U.S. 469, 486-7 (1895); State v. Camp, 110 W.Va. 444, 158 S.E. 664, 667 (1931).

13 Indeed, unless there has been a restoration to competency, there is a rebuttable presumption of continued incompetency. Davis v. United States, 165 U.S. 373, 377-378 (1897); Tarvestad v. United States, 418 F.2d 1043, 1050-51 (8th Cir. 1969), *cert. denied* 367 U.S. 935 (1970; Hurt v. United States, 327 F.2d 978, 981 (8th Cir. 1964); Kitchens v. United States, 372 F.2d 757, 760 (10th Cir. 1959), *cert. denied*, 362 U.S. 942 (1960); Gunthers v. United States, 215 F.2d 493, 496 n. 12 (D.C. Cir. 1954); Brown v. State, 219 Ark. 647, 243 S.W.2d 938, 939 (1951); State v. Bucy, 104 Mont. 416, 66 P.2d 1049, 1050 (1937).

14 *For example*, in Anderson v. State, 54 Ariz, 387, 96 P.2d 281 (1939), the juror, several months before trial, had been formally declared incompetent to manage his business affairs and had remained under the disability throughout the trial. At the hearing evidence was adduced which indicated that the juror was an alcoholic, that his business was being ruined as a

result of his affliction, that his income was being consumed by his habit, and that the declaration of incompetency was an attempt to save both his money and his business. The court further found that when sober the juror was of sound mind and normal intelligence. Declaring that "there was nothing to show that at the time of trial his condition was not normal," (96 P.2d at 283) the court held that the juror's disability did not adversely affect his ability to properly perform the functions of a juror. For other cases involving pre-trial adjudications of incompetency in which the court conducted a post-verdict investigation, *see* Grand Lodge A.O.U.W. of Ark. v. Wood, 113 Ark. 502, 168 S.W. 1070 (1914)("several months" before trial the juror had been declared insane; had been sent to a mental hospital; had remained there for "a short period;" and had been "paroled;" but had never been "legally emancipated from the disability of insanity"); Austin v. People, 106 Col. 506, 107 P.2d 798 (1940) (16 months before trial, the juror had been adjudged a mental incompetent, but had never been institutionalized nor restored to competency); Brown v. State, 219 Ark. 647, 243 S.W. 2d 938 (1951) (approximately 2 years before trial the juror had been adjudged insane by the probate court; had been confined in a mental hospital for 3 months; and had been released without a judicial restoration to sanity); Ex Parte Lovelady, 152 Tex. Crim. 93, 207 S.W. 2d 396 (1947), *cert. granted*, 333 U.S. 867, *cert. dismissed* 333 U.S. 879 (1948)(the juror had been adjudged insane approximately 7 years before the trial,

had been confined in a hospital for the insane; and had been discharged "soon after his confinement" without having been legally restored to sanity); Douthitt v. State, 182 Tenn. 577, 188 S.W. 2d 555 (1945)(the juror had been confined for a short period in an "insane hospital" approximately 8 years before trial and had been discharged as "improved"); State v. Bucy, 104 Mont. 416, 66 P.2d 1949 (1937)(approximately 10 years before trial the juror had been declared insane; had been confined in an insane asylum for less than 2 months; and had been released but had never been judicially restored to competency); Eastman Kodak Stores, Inc. v. Summers, 377 S.W. 2d 476, 481 (Kan. City Ct. App. 1964)(approximately 20 years before trial the juror had been "adjudicated to be a person of unsound mind and had never been restored;" and had, thereafter, been treated for epilepsy). Three other cases involved similar facts, but no time periods were stated. Durham v. State, 182 Tenn. 577, 188 S.W. 2d 555 (1945); Carter v. State, 102 Tex. Crim. 517, 278 S.W. 840 (1925); Newton v. State, 66 Ga. 103, 17 S.E. 2d 102 (Ct.App. 1941).

15 Jordan v. Massachusetts, 225 U.S. 167, 174 (1912) aff'g. Commonwealth v. Jordan, 207 Mass. 259, 93 N.E. 809 (1911). In Jordan, the juror was found to be insane and was committed to an "insane hospital" four days after the verdict was rendered. After a lengthy hearing the presiding justice denied defendant's motion for a new trial, ruling that "a fair preponderance of all the evidence" indicated that the juror was possessed of "sufficient

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mental capacity during the entire trial" to enable him to render an intelligent verdict. Quoted in 93 N.E. at 814. Both the Supreme Judicial Court of Massachusetts and the United States Supreme Court affirmed. Although the precise question before the Supreme Court involved the propriety of using the "preponderance of the evidence" standard, the Court noted that the holding of a hearing complied with the due process requirement.

16 State v. Camp, 110 W.Va. 444, 158 S.E. 664 (1931). (The juror became insane the day after the verdict was rendered and was hospitalized two weeks thereafter); Burik v. Dundee Woolen Co., 66 N.J.L. 420, 49 A. 442 (1901) (the juror became insane "some days" after the verdict); Iverson v. Prudential Ins. Co. of America, 126 N.J.L. 280, 19 A.2d 214 (1941)(the juror began evidencing symptoms of a mental illness 6 days after the trial's conclusion and was declared, 2 days later, to be suffering from a type of insanity "which conjures up an imaginary world and results in a loss of 'contact with reality.'" 19 A.2d at 218); State v. Welty, 65 Wash. 244, 118 P. 9 (1911) (The juror had been twice adjudged insane and committed to an insane asylum prior to trial; had not been restored to sanity at the time of trial; and 5 months after trial had been recommitted to the asylum).

17 *But see*, McKenzie v. State, 116 Tex. Crim. 395, 11 S.W. 2d 172 (1928) in which a post-verdict inquiry was conducted notwithstanding the absence of an adjudication of incompetency. The juror's mental

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competence was challenged on the basis of an "application, filed by the juror, for compensation on the ground of nervous and mental disability incurred during the World War." 11 S.W. 2d at 179. It does not appear that the parties put into issue the propriety of conducting a post-verdict investigation.

18 This principle had been enunciated prior to *Remmer*, Mattox v. United States, 146 U.S. 140, 148-150 (1892), Morley v. Cranmore Skimobiles, 67 F.Supp. 812 (D.N.H. 1946); and has been reaffirmed since *Remmer*, Parker v. Gladden, 385 U.S. 363 (1963)(per curiam); Marshal v. United States, 360 U.S. 310 (1959).

19 *See, e.g.*, Raub v. Carpenter, 187 U.S. 159, 161-162 (1902) (infancy, felony conviction); United States v. Silverman, 449 F.2d 1341 (2nd Cir. 1971)(inability to read and write English); United States v. DeLeon, 462 F.2d 170 (5th Cir. 1972)(juror under indictment); Holmes v. United States, 284 F.2d 716 (4th Cir. 1960)(improper communications to jury); Ford v. United States, 201 F.2d 300 (5th Cir. 1953)(juror convicted of felony); Ryan v. United States, 191 F.2d 779 (D.C. Cir. 1951), *cert. denied sub.nom.*, Duncan v. United States, 342 U.S. 928 (1951) (improper communications to jurors); Faith v. Neely, 41 F.R.D. 361 (N.D.W. Va. 1966) (juror misconduct, intoxication); Hollingsworth v. Duane, 4 U.S. (4 Dall.) 353 (Pa. Dist. 1801) (alienage); Lindsay v. State, 189 Tenn. 355, 225 S.W. 2d 533 (1949)(deafness): Batson v. State, 216 Ala. 275, 113 So. 300 (1927)(alienage).

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20 Although the defendants have requested that the juror undergo a mental examination, it is highly doubtful whether the court has the authority to order such an examination. The Supreme Court has held that federal courts do not have the common law power to order such an examination; Union Pac. Ry. Co. v. Botsford, 141 U.S. 250 (1891); *see also* Sibbach v. Wilson & Co., 312 U.S. 1 (1941); Camden and Suburban Ry. Co. v. Stetson, 177 U.S. 172 (1900); and no statute can be found which authorizes it. Indeed, in civil cases, the court may only order, upon a motion for good cause, a party or a person under the legal control of party to submit to a mental examination. F.R.Civ.P.35(a). *See, e.g.* Schlagenhauf v. Holder, 379 U.S. 104 (1964). Similarly, in criminal cases, only the defendant is subject to the court's control. 18 U.S.C. §§4244, 4245. *See also* Rees v. Peyton, 384 U.S. 312 (1965) (per curiam); United States v. Baird, 414 F.2d 700, 710 (2nd Cir. 1969), *cert. denied*, 396 U.S. 1026 (1970); United States v. Driscoll, 399 F.2d 135 (2d Cir. 1968); United States v. Albright, 388 F.2d 719, 7220724 (4th Cir. 1968); Alexander v. United States, 380 F.2d 33, 39 (8th Cir. 1967); Pope v. United States, 372 F.2d 710, 721 (8th Cir. 1967) (en banc), *vacated and remanded on other grounds*, 392 U.S. 651 (1968). No authority has been cited--indeed, no authority has been found--which permits the court to order a person who is neither a party nor a person under the control of a party in a judicial proceeding, to undergo a mental examination.

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21 It has been held that where a juror was able "to intelligently consider the evidence, appreciate the arguments of counsel, the rulings of law, the charge of the court, and to arrive at a rational conclusion," a new trial will not be granted. Commonwealth v. Jordan, 207 Mass. 259, 93 N.E. 809, 814-815 (1911), *aff'd* Jordan v. Massachusetts, 225 U.S. 167 (1912). *See* Ex Parte Lovelady, 152 Tex. Crim. 93, 207 S.W. 2d 396, *cert. granted*, 333 U.S. 867, *cert. dismissed*, 333 U.S. 879 (1948); Anderson v. State, 54 Ariz. 387, 96 P.2d 281(1939); State v. Camp, 110 W.Va. 444, 158 S.E. 664 (1931); Burik v. Dundee Woolen Co., 66 N.J.L. 420, 49 A. 442 (1901); Mackin v. People, 115 Ill. 312, 3 N.E. 222 (1885). *See also* United States v. Silverman, 449 F.2d 1341, 1344 (2nd Cir. 1971)(in which the Court of Appeals stated that a juror must be able "to decide a case intelligently"); Ford v. United States, 201 F.2d 300, 301 (5th Cir. 1953). In those circumstances in which a hearing might be required, testimony from the subject juror and the other jurors would be necessary to determine whether a juror deliberated intelligently.

22 McDonald v. Pless, 238 U.S. 264 (1915); Hyde v. United States, 225 U.S. 347 (1912); Mattox v. United States, 146 U.S. 140 (1392).

23 The refusal to receive affidavits from jurors attempting to impeach their verdict can be traced to Lord Mansfield's ruling in 1785, Vaise v. Delaval, I.T.R. 11 (1785); and has been "universally followed" in this country. *McDonald*, 238 U.S. at 268.

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24 *See, e.g.* Dennis v. United States, 339 U.S. 162, 168 (1950); Frazier v. United States, 335 U.S. 497, 512-514 (1948); Mattox v. United States, 146 U.S. 140 (1892); United States v. Silverman, 449 F.2d 1341, 1344 (2nd Cir. 1971); Ford v. United States, 201 F.2d 300, 301 (5th Cir. 1953).

25 *Frazier*, 335 U.S. at 513. *See also Clark*, 289 U.S. at 14; *McDonald*, 238 U.S. at 268-269; *Mattox*, 146 U.S. at 149.

26 Even the "mere opportunity for prejudice or corruption" may not be a sufficient showing. As Mr. Justice Holmes stated in Holt v. United States, 218 U.S. 245, 251 (1910); "If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain a jury trial under the conditions of the present day."

27 Stein v. New York, 346 U.S. 156, 178 (1952); Hyde v. United States, 225 U.S. 347, 382-384 (1911); Mattox v. United States, 146 U.S. 140 (1892).

28 United States v. Miller, 403 F.2d 77, 83-84 n. 11 (2nd Cir. 1968); United States v. Crosby, 294 F.2d 928 (2nd Cir. 1961), *cert. denied sub. nom* Mittelman v. United States, 368 U.S. 984 (1962); United States v. Grieco, 261 F.2d 414 (2nd Cir. 1958), *cert. denied*, 359 U.S. 907 (1959); Rotondo v. Isthmian Steamship Co., 243 F.2d 581, 583 (2nd Cir.), *cert. denied*, 355 U.S. 834 (1957); United States v. Reed, 313 F. Supp. 451, 454 (D. Conn. 1970), *aff'd* 437 F.2d 57 (2nd Cir. 1971). Other circuits

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have also continued to follow this rule. *See, e.g.* Armstrong v. United States, 228 F.2d 764, 769 (8th Cir.), *cert. denied*, 351 U.S. 918 (1956); Rakes v. United States, 169 F.2d 739, 745 (4th Cir.) *cert. denied* 335 U.S. 826 (1948); Young v. United States, 163 F.2d 187, 188-190 (10th Cir.), *cert. denied* 332 U.S. 770 (1947). The ABA Project on Minimum Standards for Criminal Justice, approved, in 1968, the following standard relating to impeachment of a verdict:

> Upon an inquiry into the validity of a verdict, no evidence shall be received to show the effect of any statement, conduct, event or condition upon the mind of a juror or concerning the mental processes by which the verdict was determined.

ABA Project on Minimum Standards for Criminal Justice, Trial by Jury, § 5.7(a) (1968).

29 The Court of Appeals held that the refusal to "examine the jurors as to their mental process" was not error by the district court. 294 F.2d at 950.

30 In State v. Kociolek, 20 N.J. 92, 118 A.2d 812 (1955), the Court stated:

> The better reasoned decisions support the exclusion of jurors' testimony as to their mental processes . . . upon the sounder ground that, being personal to each juror, the working of the mind of any of them cannot be subjected to the test of other testimony, and therefore . . . such testimony

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should not be received to overthrow the verdict to which all assented.

118 A.2d at 816 (citations omitted).

31 The jurors were asked the following group questions relating to bias and prejudice:

> Does any juror have any mental reservation as to the acceptance of these principles of law?
>
> And I would assume in response to each and every one of my questions that your silence indicates that you do not.
>
> Do you have any preconceived ideas or prejudices that would prevent or hinder you from following the instructions that the Court will give you in greater detail at a later time and the principles of law which have just recently been outlined for you?
>
> Does any juror have any prejudice or bias for or against any point of view concerning the charges summarized for you from the indictment?
>
> Does any juror know or has any juror or member of his family or any associate had any dealings, either directly or indirectly, with the defendants named in the indictment and presently on trial before you or, for that matter, with

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any member of their families or friends or associates?

. . .

Has any past experience of a juror in any way whatsoever caused a juror to doubt his ability to sit as a completely impartial and unbiased trier of the facts? Ladies and gentlemen, I have tried in these questions to direct your attention to possible reasons you might not be able to sit as a fair juror. Let me now ask you quite apart from any prior questions, does any juror have the slightest doubt in his mind for any reason whatsoever that he would be able to serve conscientiously, fairly and impartially in this case and render a true and just verdict according to the law as it will be explained?

. . . .

Let me try it a different way. I am sure you can recognize that even if I sat here until eternity caught up with me and if I had the infinite judgment of our diety I could not possibly be secure that I have covered every possible question which would root out and bring to the surface any possible prejudice which is important to a consideration of this case. I am not unaware that all of us, without exception, are the subject of various conditioning influences that we acquire in life's work and by virtue of experience which either bruises us or elevates us, but what you are asked to do as jurors is to sublimate any prejudices

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or any bias which you may have in determining the facts of the case and to accept the law as given you.

So what I am attempting to find out, and essentially this must rely upon your honesty, your good faith and your willingness to be candid with the Court, what I want to find out is upon an examination of yourselves, can you say that you can sit fairly and impartially in judgment in this case should you ultimately be chosen to serve?

Do you have any doubt whatsoever about your ability to render a fair and impartial verdict upon the facts in evidence and the law to be applied to those facts?

Soul searching is what is necessary at this point because essentially, really regardless of how you answer any questions, the fact of the matter remains that I must appeal to your honesty and your sense of fairness to reveal to the Court any sense or any feeling which might make it difficult or impossible for you to render a fair and impartial verdict.

Transcript of January 4, 1973, at pp 10, 21-23.

32 In all cases in which a juror's incompetency has been alleged as a basis for attacking a verdict, the courts, for differing reasons, have been unanimous in refusing to grant a new trial. Thus, for example, in

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Iverson v. Prudential Ins. Co. of America, 126 N.J.L. 280, 19 A.2d 214 (1941), within a week after a verdict was rendered, a juror was found to be suffering from a type of insanity "which conjures up an imaginary world and results in a loss of 'contact with reality.'" 19 A.2d at 218. Nevertheless, the trial court refused to grant a new trial because "it was not shown that the juror was so incompetent at trial as not to be able to comprehend 'the nature and quality' of his acts." *Id.* In State v. Welty, 65 Wash. 244, 118 P. 9 (1911), a juror, prior to trial, had been twice adjudged insane and committed to and discharged from an asylum. Five months after trial, the juror was again adjudged insane and committed to an asylum. The trial court denied defendant's motion for a new trial and the Supreme Court of Washington affirmed. In Anderson v. State, 54 Ariz. 387, 96 P.2d 281 (1939), the juror in question was declared imcompetent to manage his own affairs "some months" before trial, and remained under the disability throughout the trial. The Supreme Court of Arizona upheld the trial court's rejection of defendant's motion for a new trial, holding that only a declaration of insanity, without the requisite restoration to sanity, would be sufficient to disqualify a juror. Similarly, in Grand Lodge A.O.U.W. of Ark. v. Wood, 113 Ark. 502, 168 S.W. 1070 (1914), the juror in question had been adjudged insane "[s]everal months before the trial" and had been committed to the appropriate state hospital. Although he was released after a "short period" of confinement the juror was never legally restored to sanity. Admitting that the juror was disqualified

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to serve, the Supreme Court of Arkansas, nevertheless refused to order a new trial. The court reasoned that the disqualification was merely a technical violation of the statute which established qualifications for jurors, and therefore did not warrant a new trial.

See also the cases listed in n. 8, *supra*.

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* * * * *

1810 Now, ladies and gentlemen, I ask you, is a man in a position like that, with the proverbial sword of Damocles hanging over his head, going to take the chance of sitting there on that witness stand and committing a perjury that could be discovered? That is what these able lawyers are trying to tell you he was doing although try might and main as much as they could there wasn't a single pertinent fact that he testified so that they could point to as being false.

In fact, so far as Mr. Goldberg was concerned there wasn't any cross-examination on the facts at all. It was cross-examination on how bad a guy he was. And he is a bad guy. We all agree. But let's look at the facts that he testified to and how he testified to them. And how he testified to them, in detail, ladies and gentlemen, for a lengthy period on the witness stand. Hellerman sat here and names days, places, amounts, events, people present at conversations from beginning to end, the whole works. He testified that he hadn't been allowed to examine the documents and that he hadn't consulted with any other Government witnesses. And, ladies and gentlemen, because of certain inconsistencies, minor ones, but inconsistencies nonetheless, between Hellerman's testimony and the testimony of other witnesses in this case, I suggest to you that the evidence 1811 shows that Hellerman's story that he hadn't talked to other witnesses is the unvarnished truth.

Now, just take that situation and

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keep it in your minds for a moment. Is a man in the position of Hellerman, who is adrift on an ocean of fact and dredging everything he can from his memory and not in a conspiracy with other people to fabricate a story that will please the Government, is a man in a position like that with the sword of Damocles hanging over his head going to fabricate evidence when he knows that at any moment he can be tripped up and sent sprawling?

That is what the defense would have you believe, ladies and gentlemen, but the defense can't wash away the evidence and they can't wash away the fact that on no single fact of any significance whatsoever was Hellerman even disputed, was he cross-examined, were there witnesses brought in to court to disprove it.

MR. EDELBAUM: I object to it.

MR. GOLDBERG: I ask the Court instruct the jury there is no obligation.

THE COURT: Objection is sustained.

MR. EDELBAUM: I ask your Honor to instruct the jury to disregard it.

THE COURT: The defense has no obligation to produce any witnesses.

1812 MR. MC GUIRE: Your Honor, I had planned to cover the --

MR. GOLDBERG: I object to his response to the Court in arguing on your ruling, your Honor.

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THE COURT: May I see you at the side bar?

MR. MC GUIRE: Yes, sir.

(At the side bar.)

MR. MC GUIRE: Your Honor, I know that the defendants are not obligated to call any witnesses, but I think I am entitled to argue that if the defendants had had any witnesses who could disprove a single thing that Hellerman had said, you might have expected them to appear in court. They have subpoena power just like everybody else. The missing witness routine goes both ways.

MR. GOLDBERG: I think he is speaking in a loud voice.

THE COURT: This raises the problem that you anticipated yesterday.

MR. MC GUIRE: Yes, sir.

THE COURT: A problem which was put directly into issue by Mr. Edelbaum when he spoke about witnesses that the Government didn't call. I thought it was thoroughly and completely improper, it was unwarranted, but since you 1813 made no objection I decided not to make any comment about it. I think you are certainly entitled to talk to the jury about the availability of witnesses in the language expressed in the Murphy opinion, which was acceptable to the Court of Appeals and I will certainly allow that.

MR. GOLDBERG: May I be heard?

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MR. EDELBAUM: Your Honor, I respectfully move for the withdrawal of a juror and the declaration of a mistrial and I respectfully suggest to your Honor that it is the absolute rule that the defense need call no witnesses and I suggest that what I did was perfectly proper and everything I said --

THE COURT: I don't quarrel about you. You certainly suggest everything you do is proper. I am indicating for the record it was completely improper since the question was raised yesterday. Both of us have stated our position for the record.

MR. EDELBAUM: Yes, and I made a motion.

THE COURT: Your motion is denied.

MR. GOLDBERG: If your Honor thought it was improper your Honor has not hesitated to interrupt my summation, as I recall. I should not be burdened by this kind of remark made by Mr. McGuire. I didn't violate your Honor's caution prior to the time I started my summation, nor during my 1814 summation, about the availability of witnesses in the manner in which you say Mr. Edelbaum did. I should not have to sit here while Mr. McGuire says that I could have called witnesses. If he wants to be specific, let him be specific or answer a specific remark made by a counsel as to the availability of a particular witness.

But to simply spill it over on me

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because of something that Mr. Edelbaum purportedly said that your Honor feels opened the door insofar as his client is concerned, I think is improper. This is a separate trial with respect to my client, in effect, and it is a very dangerous area for your Honor, I suggest, to permit Mr. McGuire this kind of comment.

MR. MC GUIRE: Mr. Goldberg himself in his summation commented on the fact his client didn't take the stand. I don't see where the problem is.

THE COURT: I will allow it with the admonition that I have given you.

MR. GOLDBERG: May I move for the declaration of a mistrial?

THE COURT: Yes, you may.

Denied.

1815 (In open court.)

MR. MC GUIRE: Now, ladies and gentlemen, I adverted to the fact that names and dates and places, names of people, were mentioned all throughout the testimony of Hellerman and the other government witnesses that testified. Facts, facts, facts, facts, facts.

The defense has alluded to the fact, and his Honor will tell you, that it is the law that a defendant does not need to call any witnesses whatsoever; the government

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has the obligation to prove its case beyond a reasonable doubt. There is no question about that.

However, the defense, just like the government, has the capability of calling witnesses, and there are witnesses who are available to the defense, as well as to the government. I think his Honor will instruct you that you are entitled to draw an inference, if you find it is appropriate to do so, or you may draw no inference at all.

MR. EDELBAUM: I object to that and move to strike it.

THE COURT: Objection overruled.

MR. MC GUIRE: Now, the fact that nobody disputed Hellerman's story directly or on cross examination or in any other way to the facts as opposed to proper cross examination directed to show that he was an evil fellow, 1816 you may find is a terribly significant factor.

MR. EDELBAUM: I move for a mistrial in view of the statement made by the prosecutor.

THE COURT: The objection is overruled. Your motion is denied.

MR. MC GUIRE: In summary, ladies and gentlemen, the government suggests to you that the evidence supports the proposition that bad as these men who testified from the witness stand, they are capable of telling the truth, and, further, you may find from

their demeanor on the stand and the way they answer questions that in a strange kind of way for once in their rotten lives you may find from the evidence that they were telling the truth.

I would like to review the facts briefly with you. In 1968, as shown by Government's Exhibit 1, in the Belmont offering circular Belmont Franchising Corporation became an entity, came into existence. In March of 1969 it filed with the Securities and Exchange Commission a document in which it obtained the necessary clearance to sell its stock to the public. By the end of 1969, as shown by a form that was introduced in evidence at the beginning of the trial, some 28,728 shares of stock were sold in the offering.

In January of 1970, according to Goodman, Goodman arranged with a man named George Drykerman, who had control 1817 of this stock, to purchase a portion of it. You may recall that he purchased 3500 shares in the firm called EMA, a partnership, at a brokerage house called Shields & Company. Then in mid February, on a Saturday or on a holiday, Goodman and Hellerman met in the office of a man named Murray Taylor, who Mr. Goldberg points to as the villain, but who the evidence scarcely mentions, and they agree that Goodman would run the stock up in a phony way by trading shares, just like oranges, among the participants, so that it would reach a price of $15 per share from an artificially created initial price of $5 per share. This was all done, according to

the testimony, as a way of indicating to the public that there was an active market in the share of this phony corporation and that it was actually being traded, so that people like Mr. Jones could hear about it, that the price was going up, and it looked like a good thing. This was all part of a plan which was formulated at that time, and later in a series of meetings involving Hellerman, Goodman, Soldano, Schoengold, Dioguardi and Ostrer, to take the price first to $15 a share, at which point Hellerman would guarantee that Goodman and Soldano would be taken out and Hellerman would get $5 a share, you remember, for every share that was taken off Goodman's and Soldano's hands.

1818 An arrangement was made by which the rest of the group operated and quarterbacked by Hellerman would take the price continually up.

I would like to pause and discuss a couple of things that took place during this period of time. First, when Soldano was brought into the deal, you remember Hellerman takes him up to John Dioguardi's office, explains the whole thing to him from alpha through zebra, soup through nuts, so there is no misunderstanding, and so that at a later time Soldano can't claim that the deal was anything other than what it was.

And, finally, when Hellerman is able to strike a bargain with Ostrer, under which Ostrer is going to contract to purchase half the outstanding publicly held shares of this company, 14000 shares, he takes Ostrer up

to Dioguardi, too, and puts the same thing on record. You can have the testimony on that read to you if it doesn't stick freshly in your minds, a meeting between Ostrer, Dioguardi and Hellerman in which the whole thing once again from alpha to zebra and soup to nuts is explained.

Along the way Ostrer is told that the basic plan is to blow the stock out into innocent people's brokerage accounts by paying over to crooked brokers.

Now, in this general period of time, towards the 1819 end of February, beginning of March, there is another meeting at a coffee shop at 99 Park Avenue, where the whole thing has gone over again, and this is where the troops get their instructions, this is a meeting at which Halpern and Schoengold and Matty Russo -- you remember those fellows, the second team, are present, and they get marching orders, "Stevie, you do this with the stock; you can probably put away 10,000 shares; Matty, you do this; Halpern, you do this."

This is where the troops get their instructions. But they are not present, the troops, the second team, are not present at the time that the inner circle is discussing the financial affairs. And so, for example, when you have Schoengold testifying about the financial arrangements, the loan by which Hellerman and Ostrer were able to purchase all of the stock, you have Schoengold testifying through hearsay from Hellerman that it

was a hundred and twenty thousand dollar loan. That is how much the troops know. Hellerman, who is on the inside and who has worked the matter out in detail of a meeting at Pier 52, the restaurant, with Ostrer, Dioguardi and Hickey DiLorenzo, can tell you the terms of the deal exactly. He started out asking for $200,000 and wound up getting $60,000.

Speaking of corroboration, Bruce Halpern, who 1820 knows nothing about this loan at all, testified on the very day, on the very day -- you remember I showed Hellerman a calendar -- on the very day that Hellerman said he got that money, Halpern testified that Hellerman walks into his office with $60,000 in cash. Is there any way in the world that you can say to yourselves anything other than that is terribly damaging testimony.

Okay. Orders are placed for this entire block of 28,000 shares of stock at a variety of brokerage houses, approximately 14,000 shares in the name of Ostrer or his sister, Dina Gelman, at Bruce Company, Kelsey, American Global, Eastman, Dillon, and then some other brokerage houses used by associates of Hellerman, like Winter --

Winter, you remember, testified that he purchased a thousand shares in the name of -- what is it -- his son-in-law, Kleinman, at two brokerage firms called Ozol and Russel & Saxe, and Hellerman testified there was some 3500 shares or thereabouts left at Lincoln Securities which had been a part of the earlier manipulation from $5 to

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$15. There was some stock left in Soldano's nominees' names out there, and that took care of the entire box.

Finally, it got paid for by the end of March.

You remember, by the way -- and Mr. Edelbaum 1821 told you -- that Ostrer paid for the stock for which he was responsible.

Now, whether it makes a difference or not, notice the question and answer which Bruce Halpern testified to, and that was the testimony that Mr. Edelbaum reminded you of in summation. Halpern is asked on the stand in a long question whether the stock that was ordered at his firm was not eventually all paid for by Ostrer, and it takes re-direct examination to bring out the fact that of the 5,000 shares, a total of $75,000 worth of stock that was ordered and ultimately paid for at Bruce Company, Ostrer furnished only $16,100. And how did he furnish it? Why, in cash, of course, ladies and gentlemen, in cash.

What kind of a way is that to conduct an open and above board brokerage transaction, to bring $16,100 to your broker in cash? Is that one of the kind of things that you would ordinarily do? Is that a transaction which is conducted in a way so as to be completely above suspicion? Or is that the action of a conspirator who is trying to hide his transaction.

Now, from the end of March through the month of April, as Hellerman and various other witnesses testified, the price of the

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stock began to creep up from 15 dollars a share; he was buying here, selling there; finally Hellerman 1822 is worried about paying off the loan which had been made by Hickey Di Lorenzo and for which at some point in time Hellerman acquired the obligation to pay the "vig", a word you may not all be familiar with, but a word which means interest in certain quarters, and so by arranging for somebody else in Florida to buy stock in the high twenties, at 27, 28 dollars a share, Hellerman calls from Florida and gets Schoengold to call Ostrer or Ostrer's office and say, "You can sell stock."

And lo and behold, stock appears in the name of William Kilroy in the exact amounts that Hellerman and Schoengold testified to being sold from the brokerage house where Ostrer's wife is a sales representative, American Global Investors, to the brokerage house which Schoengold directs the sale be made to, Brad-Shaff.

If you have any doubt about that transaction with Mrs. Ostrer receiving the commission on the sale, you can look at the confirmations and the order tickets which were created in the ordinary course of business at this brokerage house as a paper record of the transactions, 2500 shares of stock sold apparently by Miss Kilroy, who was an employee of Ostrer's, from American Global Investors to Barad-Shaff.

It is Hellerman's testimony that the proceeds of 1823 that sale, which if you add them up as little Miss Richardson, a breath of fresh air in the courtroom, did,

that amounts to $67,806. The proceeds of that sale, according to Hellerman, were used to pay off Hickey Di Lorenzo for the loan that he had made, to pay the vigorish, the "vig", the interest that had been run up to that point, and to split the difference between Hellerman and Ostrer.

Well, the rest of the story is history, ladies and gentlemen. The market for reasons completely beyond the control of the conspirators fell apart. Along came somebody with stock that nobody knew about and started to sell it at a time when the market had been built up by this whirlwind trading to apparently a level of prices in the upper 30s. Lo and behold stock began to appear on the market and somebody who genuinely held stock that he wanted to sell, wanted to sell it at these inflated prices. Nobody would buy. The game of musical chairs stopped right then and there, and the conspirators who had the stock at that time were left standing with it.

That sets up another series of meetings. You will recall the testimony about them in detail, meetings at Hellerman's office, meetings at Dioguardi's office, meetings at Dioguardi's home in Mahopac, all of which meetings had to do with the subject of what to do about this unfortunate 1824 situation, and that was discussed in detail.

Well, first off, there is a problem of allocating the losses among the conspirators. Ostrer is screaming; Soldano is screaming. They held stock, they have lost money. And Dioguardi is in there acting as a mediator,

EXCERPTS FROM SUMMATION IN
BEHALF OF PROSECUTION

telling Hellerman how much time he has to make the thing good, telling Soldano to leave the room while he discusses the subject with Hellerman, asking Schoengold's advice on whether it is a good idea to conduct a bust-out scheme, which is a bankruptcy fraud, and Schoengold tells him it is too risky. Dioguardi says nothing and the meeting ends there very quietly.

Well, that is the story of this case, ladies and gentlemen.

I ought to mention to you something that has been kind of buried during the course of our various lawyers' orations here. There are, I believe, 16 counts in this indictment that are going to be submitted to you, the jury. There is one conspiracy count; that charges the defendants with participating in a criminal scheme to manipulate the price of Belmont stock from 5 to 15, and then from 15 upwards for their own profit. And it charges a good many other things. Judge Edelstein will cover that subject, I am sure, very thoroughly in his instructions to you.

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1621

JOHN DIOGUARDI, PETITIONER

v.

UNITED STATES OF AMERICA

No. 73-1631

LOUIS OSTRER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 3a-27a) [1] is reported at 492 F. 2d 70.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 1974. Upon timely application, Mr. Justice

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[1] "Pet. App." refers to the appendix in No. 73-1621. The three volumes that were designated "Appellants' Appendix" in the court of appeals are referred to as "App."

Marshall extended the time for filing a petition for a writ of certiorari to April 30, 1974. The petitions for writs of certiorari were filed on April 27, 1974 (No. 73-1621) and April 30, 1974 (No. 73-1631). The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a post-trial letter from a juror urging petitioner Dioguardi to repent and claiming, *inter alia*, that the writer possessed clairvoyant powers is sufficient to justify an inquiry into that juror's mental competence at trial.

2. Whether in the circumstances of this case the government's summation comment on the failure of the defense to produce witnesses to contradict the factual content of its case constituted a comment on the petitioners' failure to testify on their own behalf.

3. Whether in the circumstances of this case two different unlawful stock purchases could provide a basis for two separate counts in the indictment and separate and consecutive penalties.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York,[2] petitioners were convicted on a multi-count indictment charging violations of

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[2]Of the seven other defendants named in the indictment, three pleaded guilty, three were tried jointly at a separate trial, and one pleaded guilty in a related case. See *United States* v. *Greenberg*, No. 72-2368 (C.A. 2), affirmed from the bench, February 16, 1973.

federal securities laws (15 U.S.C. 77q(a), 77x, 78j(b) and 78ff), Rule 10b-5 of the Securities and Exchange Commission (17 C.F.R. 240.10b-5),[3] the federal wire and mail fraud statutes (18 U.S.C. 1341 and 1343) and the federal conspiracy statute (18 U.S.C. 371). Petitioner Ostrer was convicted on eleven counts of the indictment; he was sentenced to ten concurrent terms of imprisonment ranging from two to three years, and fined $55,000.[4] Petitioner Dioguardi was convicted on four counts of the indictment; he was sentenced on two counts to terms of five years' imprisonment, one of which was suspended, and sentenced on two other counts to terms of two years imprisonment. The sentences were to run consecutively. He was also fined $30,000.

The facts of this case were thoroughly discussed in the opinion of the court of appeals. Briefly, they show a scheme to manipulate the price of the stock of Belmont Franchising Corporation upward from five to fifty dollars per share during a five month period in 1970.

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[3] Under the Securities Act of 1933, 15 U.S.C. 77a, 77aa, section 77q(a) prohibits fraud in the sales of securities. Violations of this section are punishable under Section 77x. Rule 10b-5, promulgated under 15 U.S.C. 78j(b), Securities Exchange Act of 1934, prohibits fraud in the purchase and sale of securities. Violations of this rule are punishable under 15 U.S.C. 78ff.

[4] On count 36, Ostrer was sentenced to five years' imprisonment. The sentence was suspended and he was placed on probation for one day.

In January of 1970, Anthony Soldano and Fred Goodman, acting in concert with Michael Hellerman,[5] began to acquire substantially all of the publicly tradeable shares of Belmont in the hope of creating the appearance of an active public market in the stock at approximately five dollars per share. Hellerman promised Soldano and Goodman that he and his associates would purchase the stock from them once they had succeeded in acquiring all of the Belmont stock and raising the price of a share to fifteen dollars. Hellerman planned a further upward manipulation of the stock from fifteen dollars.

In furtherance of the stock manipulation scheme, petitioner Ostrer agreed to place purchase orders for Belmont stock. In turn, he expected to reap large profits after brokers were paid off to sell the shares at much higher prices to their customers. The market collapsed, however, before these expectations could be realized.

Petitioner Dioguardi arranged for Ostrer to obtain a loan with which to purchase a number of shares. Hellerman and Dioguardi had an agreement whereby Dioguardi would receive twenty per cent of whatever Hellerman made from this scheme. On one occasion, Dioguardi was given $30,000 by Hellerman.

At trial, Dioguardi called no witnesses but sought on cross-examination to impeach the credibility of the government's chief witnesses, who were petitioners' accomplices. Ostrer did not testify but called two witnesses whose testimony indicated that Ostrer had been victimized by Hellerman (Pet. App. 7a-11a).

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[5] Hellerman later pleaded guilty and testified for the government.

About ten days after the trial, Dioguardi received a letter from one of the jurors, Miss Genena Rush, urging him to repent. The letter contained, *inter alia*, references to clairvoyance and astrology (Pet. App. 11a, n.7).

ARGUMENT

1. Petitioners contend that the trial court erred in denying their request for an inquiry into the mental competence of a juror who wrote petitioner Dioguardi a letter after trial urging him to repent and stating, *inter alia*, that she possessed clairvoyant powers. They claim that their right under 28 U.S.C. 1865(b)(4) to a jury of persons not "* * * incapable, by reason of mental * * * infirmity, to render satisfactory jury service" was thus violated. The court of appeals correctly rejected this contention. As it observed (Pet. App. 17a):

> It is well settled that only clear evidence of a juror's incompetence to understand the issues and to deliberate at the time of his service requires setting aside a verdict. And only strong evidence that it is likely that the juror suffered from such incompetence during jury service will justify an inquiry into whether such incompetence in fact did exist.[6]

The purpose of this rule is to protect jurors from harassment, to preserve the sanctity of the jury room, and to prevent jury tampering, uncertain verdicts, and a flood of frivolous petitions. See *Stein* v. *New York*, 346 U.S. 156, 178; *McDonald* v. *Pless*, 238 U.S. 264, 268; *Miller* v. *United States*, 403 F. 2d 77, 82 (C.A. 2).

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[6]Judge Feinberg, dissenting, "heartily endorse[d]" the majority's position that there must be "substantial if not wholly conclusive evidence" of a juror's incompetence during trial before a post-verdict inquiry is ordered (Pet. App. 32a). He took issue only with the majority's conclusion that such evidence did not exist in this case.

Because it is significantly more intrusive and less likely to turn on objective evidence than other sorts of jury probes, a competency inquiry offers unprecedented opportunities to harass, humiliate, and intimidate individual jurors.[7] Consequently, as the court of appeals noted (Pet. App. 19a-20a):

> * * * [c]ourts have refused to set aside a verdict, or even to make further inquiry, unless there [has been] * * * proof of an adjudication of insanity or mental incompetence closely in advance of the time of jury service. Only when proof of this nature has been offered, or proof of a closely contemporaneous and independent post-trial adjudication of incompetency, have courts conducted hearings to determine whether the disability in fact affected the juror at the time of trial. [Footnotes omitted.]

Although no evidence of an insanity adjudication was adduced, the court of appeals did not rest its decision upon this standard, as petitioners claim.[8] Instead, the court chose to stress the heavy burden of proof attending a request for an inquiry and concluded that "[n]o evidence was offered of any history of mental instability on the part of Miss Rush, much less evidence of any adjudication of insanity or incompetence" (Pet. App. 21a).

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[8]Petitioner Ostrer erroneously asserts that the decision of the court of appeals was "premised on the assumption that the mental infirmity disqualification of 28 U.S.C. §1865 applied only to mentally

In support of their request for a competency hearing, petitioners rely almost entirely[9] on a post-trial letter allegedly written by the juror to petitioner Dioguardi and the analyses of that letter by seven different psychiatrists. The analyses were based, however, on an erroneous version of the letter. The copies provided by defense counsel stated " * * * I cannot *admit* what appear before me when I was on the jury bench," instead of correctly stating " * * * I cannot *omit* what appear before me when I was on the jury bench" (Pet. App. 11a, n. 7, see also n. 8; emphasis added). The mistranscription was crucial, since the mistake constituted the only concrete evidence in the letter that the juror had hallucinated at trial. Five of the seven psychiatrists consulted expressly relied on this error as evidence of hallucinations during trial, as well as

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ill persons who have been formally adjudicated as 'insane' or 'incompetent' and that a convicted defendant may not obtain a new trial if he discovers shortly after the verdict that one (or presumably several) of his jurors were mentally ill, so long as they were never formally adjudicated as insane" (Pet. No. 73-1631, p. 14). Petitioner Dioguardi further misreads the opinion below by claiming: "The opinion holds that no showing of mental infirmity, except proof of a *contemporaneous* adjudication of mental incompetence, ever warrants inquiry into whether a juror was mentally unqualified during trial * * * " (emphasis added) (Pet. No. 73-1621, p. 10).

[9]The only other suggestion of mental incompetence adduced by petitioners is the contention, raised for the first time in this Court, that when the juror in question stated on voir dire that she was a "patient attendant" at Flower Fifth Avenue Hospital, she did not mean a "nurse's aide" but a mental patient who worked part-time attending other patients. There is no evidence to support a conclusion that Flower Fifth Avenue was a mental hospital or that the juror was a mental patient there. This speculation, which is unsupported by the record before this Court, can afford no basis for relief here. Petitioners' remedy, if any, must be before the district court.

evidence of mental illness in general,[10] while the analysis of a sixth was influenced by it.[11] Ironically, had the sentence been accurately reproduced it would have provided strong evidence of mental incompetence. In the context of the letter, it is a statement by the juror that she could not ignore the evidence at trial despite her sympathy for Dioguardi.

Moreover, as the court of appeals observed, the psychiatric studies of the letter were "essentially horseback uninformed opinions" (Pet. App. 17a). The psychiatrists evaluated the juror's mental state at trial on the basis of

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[10] Dr. Stanley Portnow stated in an affidavit:

> Perhaps the most significant statement in the letter concerning the juror's state of mind during the course of the trial is as follows: "As I stated I cannot admit what appear before me, when I was on the jury bench." We have here an admission that the juror visually hallucinated during the course of trial [App. 1065-66].

Dr. Robert W. Damino also attached great importance to this statement:

> The content of the letter of Gemena Rush indicates very definitely that this woman was in a delusional state while serving on the jury: "As I stated I cannot admit what appear before me, when I was on the jury bench." This single statement alone, even in the absence of a large amount of other psychodynamic evidence, indicates that Gemena Rush could not properly evaluate evidence or make any kind of logical connections in regard to the evidence when she was serving on the jury [App. 1072].

Dr. Damino further asserted that the statement was evidence that "her decision for conviction may very well have been a decision of convicting herself because of guilt regarding her own activities, rather than any activities of the accused." [App. 1072.]

[11] Dr. Jerry C. Atkins did not discuss any of the letter's statements, but referred to the "visions" the juror had during trial (App. 1073). The erroneous statement in the letter is the only possible basis for a conclusion that the juror hallucinated at that time.

the letter alone.[12] Although free to provide their psychiatrists with information regarding the trial, its issues, and the juror's background, appearance, and in-court behavior, petitioners apparently failed to do so. Without such information, the letter's tone, language, references, or structure cannot be fairly and properly evaluated.

Further, several of the analyses show evidence of having been hastily conceived. Only one of the analyses, that of Dr. Portnow, was in affidavit form; the others were simply letters. Doctors Zucker, Atkins, and Karlan set forth their conclusions without discussing the evidence in detail or indicating the theories on which their findings were based. Few of the psychiatrists showed any knowledge of the purpose their studies were to serve.

The letter, moreover, is itself evidence of mental competence. It clearly indicates that days after the trial the juror could still recall key witnesses and points of evidence. Touched by his ordeal, the juror wrote to petitioner Dioguardi to offer him encouragement and to suggest that through repentance he would find salvation. Her expressed belief in clairvoyance, curses and astrology was not evidence of mental derangement, but indicative of a deeply religious and superstitious person with little formal education. The letter thus provides no evidence that the juror could not understand the proceedings and participate in the deliberations.

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[12] Apparently only Dr. Stanley Portnow was provided with additional information. His affidavit states that he had the opportunity to read the government's memorandum opposing the motion for a new trial (App. 1062).

The juror's behavior at trial, in fact, left a strong impression of mental competence. As the trial judge observed (Pet. App. 50a-51a):

> [T]here was nothing in the demeanor of the juror during *voir dire*, trial or deliberations to indicate that she was anything but competent to serve on the jury. On *voir dire*, the jurors were asked group questions in an effort to elicit from them their feelings of bias or prejudice which would prevent them from rendering a fair and impartial verdict [footnote omitted]. In direct colloquy with me, the juror answered directly and responsively, stating that she understood my questions and comments, and specifying the particular ones which applied to her. Nothing in her responses and demeanor indicated that her reasoning abilities or mental processes were deficient. Indeed, her ability to recall my questions applicable to her, conveyed the opposite impression. Likewise, during the three weeks of trial and three days and nights of deliberations, I did not notice anything unusual about her. Nor was anything unusual concerning her brought to my attention by either the attorneys or jurors.

In sum, petitioners' right to a jury of persons of sufficient mental competence "to render satisfactory jury service" under 28 U.S.C. 1865(b)(4) was not shown to have been violated, and they failed to adduce sufficient evidence to justify a mental competency inquiry.

2. Petitioners next contend that the prosecution's comment on their failure to call witnesses to rebut the factual content of the government's case violated their Fifth Amendment right to remain silent, since, they claim, they alone could have given contradicting testimony. This contention was fully discussed and correctly rejected by the court of appeals (Pet. App. 22a-24a).

In contrast to the cases relied on by petitioner (see *United States* v. *Flannery*, 451 F. 2d 880, 881-882 (C.A. 1); *United States* v. *Handman*, 447 F. 2d 853, 855 (C.A. 7)), the comment in question was, as the court of appeals declared, "neutralized" by "a prompt, corrective instruction" given by the trial court (Pet. App. 23a). The court also noted that unlike *Handman*, where the defendant was implicated solely by an informer's testimony about a telephone conversation between himself and the defendant, "this was not the close situation in which it was a question of the defendant's word against the word of one other" (*ibid.*). Finally, the court concluded that, given the scope of the operation, the large number of people involved, and the meetings "at which more were present than the defendants and the government's witnesses," witnesses could have been called to testify "or at least that in many other ways defendants could have waged factual war with the detailed evidence of the government's witnesses" (*ibid.*).

The prosecutor's statement, therefore, did not constitute an improper comment on the petitioners' failure to testify, and there is no conflict among the circuits on this issue.

3. Finally, petitioner Dioguardi contends that the trial court improperly imposed separate and consecutive penalties on him for the violations in counts 16 and 17, which he claims were part of a single transaction. This contention was fully discussed and correctly rejected by the court below (Pet. App. 26a-27a).

Count 16 involved the confirmation of the purchase in petitioner Ostrer's name of 2,000 shares of Belmont stock through Bruce & Co. on March 10, 1970; Count 17 involved confirmation of a similar purchase through Kelsey & Co. on the next day. Dioguardi argues that the

purchases and their confirmations should be treated as a single transaction in which Ostrer was attempting to purchase half of the outstanding shares of Belmont stock (Pet. 19-22). As the court of appeals observed, however, the debate over "whether such transactions constitute a multiple offense, the essence of the violation being illegal use of the mails, or a single offense, the essence being fraud" has been resolved "in favor of the position that each transaction in a securities fraud case constitutes a separate offense" (Pet. App. 26a). See *United States* v. *Sanders*, 415 F. 2d 621 (C.A. 5), certiorari denied, 397 U.S. 976; see also *United States* v. *Binstock*, 37 F.R.D. 13 (S.D.N.Y.). In so ruling, it recognized that the unlawful acts described in counts 16 and 17 were fraudulent not only with respect to the scheme as a whole, but with respect to the investing public as well. Each of the purchases created the appearance of an active rising market in Belmont stock for the purpose of inducing members of the public to buy (App. 17).

As the court of appeals concluded, "[a]lthough a situation can be envisioned in which consecutive sentences on multiple fraud convictions would be questionable," the sequence of sentences imposed here on petitioner Dioguardi lay "within the [sound] discretion of the trial court" (Pet. App. 27a). See *United States* v. *Sanders*, *supra*, 415 F. 2d at 626.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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SEPTEMBER 1974.